

IN THE EMPLOYMENT RELATIONS AUTHORITY

AUCKLAND

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

[2022] NZERA 624
3152643

BETWEEN MARIA JACOBS
Applicant

AND FINCARE LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Michael Kim, counsel for the Applicant
Eska Hartdegen, counsel for the Respondent

Investigation Meeting: 16 and 17 August 2022 at Auckland

Submissions and other 18 August 2022
material received from
the Applicant and
Respondent:

Determination: 25 November 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Maria Jacobs claims she was an employee of Fincare Limited (Fincare). She seeks wage arrears, compensation, as well as reimbursement of legal costs. Fincare denies it employed Ms Jacobs. Fincare states Ms Jacobs was an independent contractor and as such was not entitled to employee benefits.

The Authority's investigation

[2] This matter was set down for an investigation meeting on 26 and 27 August 2022 to investigate the preliminary issue as to whether Ms Jacobs was an employee of Fincare.¹ During the meeting, I heard evidence from Ms Jacobs and a former co-worker

¹ Employment Relations Act 2000, s161.

Wanda Botha. I also heard evidence from Fincare directors, Bernard and Michelle de Wet.

[3] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence by the parties and their submissions. With the concurrence of the Chief of the Authority, this determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act.

Issues

[4] The issue for investigation and determination is was Ms Jacobs an employee of Fincare or a contractor for Fincare?

Background

[5] Fincare sells and advises on insurance products, including income protection insurance, medical insurance, total permanent disability insurance, and other insurance products.

[6] On 31 July 2019, Fincare advertised a position as an insurance administrator on a South African community internet page. The role was to provide broking and administrative support. Ms Jacobs, a recent migrant from South Africa, responded to the advertisement and was interviewed by Bernard and Michelle de Wet. Ms Jacobs was advised that the role was for an independent contractor. Mr and Mrs de Wet explained to Ms Jacobs what it meant to be an independent contractor, including that Ms Jacobs would have to file her own tax return, ACC, etc. The arrangement was for Ms Jacobs to invoice Fincare on a monthly basis.

[7] Ms Jacobs asked the de Wets if the position would affect her residency application, because she and her husband were short of the points required for residence. Ms Jacobs said Mr de Wet replied that she would have a chance to talk to an immigration adviser about her queries, and he would be happy to help her with her application.

[8] On 12 August 2019, Ms Jacobs work visa was approved, and she signed a contract for the role as an administrator. The contract specified that she was an “independent contractor” and that she would be working 40 hours per week at \$25 per hour.

[9] On 13 August 2019, Ms Jacobs started working for Fincare. The role consisted of providing administrative support, liaising between clients, brokers and insurance companies regarding insurance policy status and renewals, client updates and accounts, etc. Ms Jacobs was also responsible for attending to general client enquiries, including insurance quotes and the specific covers the various insurance policies provided, and managing office supplies.

[10] Initially, Ms Jacobs worked office hours between 8 am to 4 pm, Monday to Friday. Due to traffic issues Ms Jacobs, with agreement of Ms de Wet, changed her hours to between 7 am and 3 pm.

[11] On 16 October 2019, Ms Jacobs completed her registration as a 'registered financial adviser' with the Financial Markets Authority. She signed a Partners Life Agreement (PLA). The PLA stipulated that she was an independent contractor and also a clause that stipulated that she would be responsible for any commission debts, and commission would be clawed back on any lapsed policies she had sold.

[12] To become an 'authorised financial adviser', Ms Jacobs was required to complete the National Certificate in Financial Advice.

[13] In November 2019, Ms Jacobs signed the Fincare Adviser Agreement (FAA). The agreement also stipulated that she was an independent contractor and that she would be required to provide advice or service on matters that Fincare authorised her to. Remuneration was on a commission only basis.

[14] During the first Auckland lockdown in 2020, Ms Jacobs did administration work from home using a computer provided by Fincare. Although the de Wets' understanding was that Ms Jacobs was not entitled to the employee COVID wage subsidy as a contractor, they paid her for four hours a day.

[15] In late April 2020, Mr de Wet asked Ms Jacobs to focus more on the financial adviser role, and accordingly, Ms Jacobs usual office hours were reduced to approximately 25 hours per week and she would finish work at 1pm.

[16] In June 2020, Ms Jacobs enrolled herself with Strategi to complete the core strand of the certificate course to become an authorised financial adviser. Ms de Wet wrote to Strategi to support Ms Jacobs and confirmed she was employed by Fincare. Ms Jacobs reimbursed Fincare for the course fee of \$1,207.

[17] On 24 August 2020 Ms Jacobs notified the de Wets she was resigning from Fincare Ltd and provided two weeks' notice. She then moved to De Vere Group New Zealand where she currently works.

[18] After Ms Jacobs resigned from Fincare, several clients Ms Jacobs had signed up to Fincare cancelled their insurance products. Ms Jacobs received a commission statement for an outstanding balance of \$3750.50 to be clawed back due to these client's lapsed policies, which Ms Jacobs paid.

Relevant law

[19] The first step I must undertake is to determine whether Ms Jacobs was an “employee” as defined by s 6 of the Act.² The Act at Section 6(2) of the Act relevantly provides that: “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.”

[20] Section 6(3) states that, for the purpose of subsection (2), the court or Authority must consider all relevant matters, including any matters that indicate the intention of the persons, and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. When considering “all relevant matters” the Supreme Court’s decision in *Bryson v Three Foot Six Limited* (No.2) provided guidance on what “all relevant matters” in s 6(3)(a) meant.³

[21] Briefly stated, the Supreme Court held in *Bryson* that “all relevant matters” included the written and oral terms of the contract between the parties and the way it operated in practice. It required the Court or the Authority to have regard to features of

² Employment Relations Act, s161.

³ [2005] ERNZ 372.

control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test).

The Authority's view of the employment relationship problem

[22] In determining the real nature of the relationship I will consider the following:

- a) the intention of the parties;
- b) the terms of the agreement;
- c) the behaviour of the parties in implementing the agreement;
- d) the level of control or supervision (control test);
- e) the level of Ms Jacobs integration into Fincare's business (the integration test);
- f) whether the Applicant was effectively working on her own account (the fundamental test); and
- g) industry practice.

Intention of the parties and terms of the agreement

[23] Ms Jacobs submitted that she was unaware of what a contract of service was. However, she gave evidence that Mr and Mrs de Wet explained that she would be an independent contractor and not an employee. They also explained to her the nature of a contract for service, the fact she would not receive employee entitlements such as holiday pay, and would be responsible for paying her own tax, ACC, GST registration etc.

[24] Ms Jacobs said she had previously only worked as an employee in a bank and later as an insurance advisor for six years prior to coming to New Zealand. However, she cannot be described as naïve. She said she read the contract which stipulated that she was an independent contractor and signed it willingly.

[25] Ms Jacobs then went on to sign two further agreements selling financial products, the FAA and PLA, which also specified that she was an independent contractor. These agreements were separate to her administration contract as she was remunerated on a commission only basis rather than an hourly rate.

The behaviour of the parties in implementing the agreement

[26] Ms Jacobs described herself as being a perfect fit for the administrative role. She went about her daily duties providing administrative support, liaising between the clients, the brokers, and insurance companies regarding insurance policy status and renewals, client updates and accounts, etc. At no time during the relationship did Ms Jacobs raise dissatisfaction in implementing the role. At times she took instruction from the de Wets and Ms Botha gave evidence regarding supervising her. The de Wets were satisfied with Ms Jacobs' performance as an administrator and encouraged Ms Jacobs to work as a financial advisor.

[27] When Ms Jacobs was registered as financial advisor her work required that she visit customers, and she decided when and where to make such visits. Ms Jacobs continued to work up to 25 hours per week doing administration work as the commission-based work did not provide a guaranteed monthly income.

Control test

[28] The control test looks at the degree of control or supervision exercised by the employer over the alleged employee's daily work. The test asks whether the alleged employer had the right to control the person alleged to be an employee.

[29] Ms Jacobs states there was a level of control in the contractual hours she had to work and that she had to work at Fincare's premises most of the time in the administrative role.

[30] Fincare says it did not exercise "significant control" over Ms Jacob's work, distinguishing her role from characteristics of a contract of service. Fincare says Ms Jacobs was able to work the hours she chose, although the nature of the administrative role did require her to be available during office hours, preferably at Fincare's premises. However, she changed her working hours to suit her requirements.

[31] In regard to leave, Ms Jacob said she was required to give notice prior to taking leave, but Mr de Wet couched it as an expectation she would give notice. This was because Fincare would need to get someone to cover the administrative role. It was accepted that from time to time the de Wets would instruct Ms Jacobs on what to do

during her working day and Ms Botha said at times she supervised Ms Jacobs in her role.

[32] In her financial advisor role Ms Jacobs had more autonomy in choosing the hours she would work on a weekly basis. She did not take direction from the de Wets and would arrange her own engagements with clients.

Integration test

[33] Ms Jacobs said that she was an integral part of Fincare's business, sharing common interests not only in the economic benefits but also in the risk and liabilities. In her administrative role she was in the core of the business, and it was necessary for Fincare to find a replacement if she was to go on leave.

[34] In her financial advisor role Ms Jacobs had more autonomy in dealing with clients and on how many products she would attempt to sell on a weekly basis.

Fundamental test

[35] This test requires consideration as to whether the Applicant was effectively working in business on her own account.

[36] In her administrative role Ms Jacobs was working for Fincare. She was not effectively working in business on her own account. She was carrying out the role as an administrator for over a year but for all intents and purposes was an employee.

[37] This is distinguished from her financial advisor role where she had more autonomy. She was not the proprietor of the clientele that she built, nor was she allowed to take them with her as she left or to sell them as goodwill. However, proprietorship over ownership by the principal company is not uncommon in the insurance and financial advisor industry.

[38] Ms Jacobs submits that the relevant question is whether she benefited from working as an independent contractor rather than as an employee and this increased her ability to generate more income by working as a financial adviser. It would seem on the evidence that she did. She was able to sell as much product as she wished to increase her remuneration.

Industry practice

[39] Industry practice is a relevant factor in assessing the real nature of the parties' relationship. Evidence was that it is not uncommon in the insurance or finance industry for companies to engage contractors as financial advisors. As Ms Jacobs was an agent for Fincare, Fincare was required to cover her indemnity insurance.

[40] Also, Ms de Wet gave evidence that exclusivity of an advisor to one brokerage company is usual in the industry, and Ms Jacobs as such could only sell products for her clients provided by Fincare or Partnerslife. As a financial advisor, Ms Jacobs also carried the risk of financial loss through the provision of the clawback clauses in the financial adviser contracts if a sold policy was cancelled.

Conclusion

Administration role

[41] When Ms Jacobs and Fincare entered into the initial relationship for the administration role, there was no meeting of minds as to the real nature of their relationship when signing the administration contract. I find that although Ms Jacobs signed an independent contractor agreement for her role as office administrator, she was in fact carrying out the role of an employee. Ms Jacobs wanted the role as administrator and being new to New Zealand was unfamiliar with local employment practices. She accepted the contract given to her by Fincare as being standard.

[42] Applying the above tests, I find that the degree of control or supervision exercised by the Fincare over Ms Jacobs' daily work in her administration role was equivalent to that of an employer's control over an employee. She was also working set hours and on an hourly rate for over a year. Ms de Wet confirmed to Ms Jacobs that she was an employee when she wrote to Strategi to enrol her in the financial adviser qualification course.

[43] Under the integration test the evidence supports a finding that Ms Jacobs was an integral part of Fincare's business in her administrative role. I find that Ms Jacobs actually entered into an employment relationship with Fincare and was entitled to the statutory obligations that arise from an employment relationship.

Financial adviser role

[44] When Ms Jacobs and Fincare entered the relationship for the financial advisor's role, Ms Jacobs was cognisant of the contractual provisions and the independence the role provided. In her financial advisor role Ms Jacobs had more autonomy. She was not bound by set hours and could increase her ability to generate more income as a financial adviser by obtaining commissions from the selling of financial products. She controlled the hours she worked, where she worked and how she worked. She was not subject to the same level of supervision or direction in her daily work that she was in her administrative role.

[45] This arrangement suited Ms Jacobs as she retained the security of income of being an employee in the administration role. I find that Ms Jacobs was an independent contractor when she signed the FAA and PLA agreements, completed her registration as a 'registered financial adviser' with the Financial Markets Authority, and started working selling insurance products in accordance with those agreements. Therefore, in her role as a financial adviser Ms Jacobs was an independent contractor, not an employee.

[46] The matter will now be set down for a further case management conference to discuss further directions for the filing of evidence and the setting down of an investigation meeting to resolve outstanding issues regarding Ms Jacobs' employment entitlements.

Costs

[47] Costs are reserved at this stage. The parties are encouraged resolve any issue of costs between themselves.

Andrew Gane
Member of the Employment Relations Authority