# New Zealand Employment Relations Authority Decisions



## Kumandan v Eastzone Realty Limited [2011] NZERA 187; [2011] NZERA Auckland 135 (6 April 2011)

# New Zealand Employment Relations Authority



## Kumandan v Eastzone Realty Limited [2011] NZERA 187 (6 April 2011); [2011] NZERA Auckland 135

Last Updated: 20 June 2011

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2011] NZERA Auckland 135 5315319

BETWEEN

DELAWER KUMANDAN Applicant

AND

EASTZONE REALTY
LIMITED
Respondent

Member of Authority: Representatives:

Investigation meeting: Determination:

R A Monaghan

D Kumandan, in person
C Chilwell, counsel for respondent
11 February 2011
6 April 2011

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Delawer Kumandan says his former employer, Eastzone Realty Limited (ERL) dismissed him unjustifiably.

[2] ERL says that at the relevant time Mr Kumandan was not an employee but was an independent contractor. Accordingly Mr Kumandan cannot pursue a personal

grievance.

[3] This determination addresses whether the parties were in an employment relationship.

**The parties' agreement**

1. Initial discussions between the parties [4] In or about October 2007 Mr Kumandan and his wife were visiting New Zealand when they decided to attempt a permanent move to this country. Since Mr Kumandan qualified as a lawyer and had practised in property law in South Africa, as well as holding a real estate licence there, he turned to opportunities in real estate in New Zealand. He found an advertisement in the Howick and Pakuranga Times of October 4 2007 for a 'real estate personal assistant (administrative)' at a Harcourts agency operated by ERL. The advertisement said one of the top performing sales consultants sought an assistant. Strong organisational skills and computer knowledge were requirements. The position was clerical in nature.

[5] Mr Kumandan approached ERL. He was referred to Christine Fowler, who was the manager of ERL's Howick branch. Over the course of a series of conversations the two did not discuss the clerical position in the advertisement but rather a possible salesperson's role, as Ms Fowler believed ERL needed people like Mr Kumandan. It was common ground that the conversations included a discussion about the need for a real estate salesperson's qualification, and that Mr Kumandan indicated he would complete the necessary course. Mr Kumandan also accepted that during one of the conversations Ms Fowler told him that as a salesperson he would have to be an independent contractor.

[6] Mr Kumandan's immigration status was relevant in the discussions. Mr Kumandan advised Ms Fowler that he would need a work permit, and that he was currently in the country on a visitor's visa. He would need to leave New Zealand. He told the Authority that, at the time, he had about one month left on his visitor's visa.

[7] His account at the investigation meeting was also that he explained to Ms Fowler that once he had obtained permanent residency he would be able to work as an independent contractor. Ms Fowler recalled a discussion about the need for a work permit but not about residency.

[8] I consider it unlikely that residency was mentioned in those early discussions, and even less likely that there was a discussion to the effect that Mr Kumandan could not be engaged as an independent contractor until he had obtained residency. This is particularly so because none of the contemporaneous documentation - and nothing else in the evidence - refers to residency or any discussion about it. Moreover the

Immigration Act 1987 (which was then in force) did not on its face necessarily link the grant of a work permit with the existence of an employment relationship rather than a contractual relationship in all cases. Mr Kumandan later gained an appreciation of the detailed application of immigration policy as it applied to his circumstances when matters progressed as I will describe.

[9] For these reasons I find there was no agreement that Mr Kumandan would be engaged as an employee until he had obtained residency.

[10] I construe the discussions as reaching agreement in principle that Mr Kumandan would work as a real estate salesperson

for ERL when he obtained a work permit. ERL would assist Mr Kumandan to obtain the permit. At the time there was also a mutual understanding that the engagement as a real estate salesperson would be on the basis that Mr Kumandan was an independent contractor.

[11] Mr Kumandan went ahead and obtained a New Zealand real estate salesperson's qualification later in October. He was issued with a real estate salesperson's certificate dated 26 October 2007. ERL applied under s 45 Real Estate Agents Act 1976 for a certificate of approval of real estate salesperson in respect of Mr Kumandan in November 2007. A certificate of approval was issued and dated 14 December 2007.

[12] However Mr Kumandan's visitor's visa expired after he had completed his real estate salesperson's course, and he left New Zealand. He was in New Zealand again on or about 23 November, when the application for a certificate of approval was prepared, but had left again before he was able to commence the sales development programme Harcourts had arranged for him.

2. Whether there was a written agreement

[13] In or about March 2008 Mr Kumandan entered New Zealand again on a visitor's visa, and contacted Ms Fowler.

[14] Apparently on 25 March 2008, Ms Fowler's administration manager partly completed a standard 'new salesperson checklist'. The checklist included an entry: 'contract given' which was not completed or signed. The 'contract' was the 'Harcourt's Agreement for Sales Consultants' which I accept was the document usually provided to Harcourts' real estate salespeople, and which contained the following clause:

*4. Independent contractor*

*You agree that you are engaged (and have always been engaged) as an independent contractor and not as an employee, joint venturer or partner of the company.*

[15] Although an unsigned copy was produced in the Authority no such contract, signed by the parties, was produced. Mr Kumandan denied seeing the contract and said he did not sign one. ERL asserted that Mr Kumandan had been provided with a contract, and expressed concern that it had been removed from his desk when he ceased working for ERL. However on their own evidence neither the managing director David Clifton nor Ms Fowler signed the contract on behalf of ERL, nor even provided a copy to Mr Kumandan themselves. The person most likely at least to have provided a copy to Mr Kumandan (if one was provided) was the administration manager, who did not give evidence. A copy of the bundle of materials sent to the administration office at Papakura in relation to Mr Kumandan's engagement, and in which it was said the contract would be found, did not contain the contract.

[16] It is not likely that the contract was provided to Mr Kumandan in or about March. Although Mr Clifton expressed certainty that the contract was provided to Mr Kumandan at or about the time of the subsequent receipt of notification that a work permit had been granted, there was no evidence in support and his certainty was based only on assumption. I am not satisfied Mr Kumandan received, let alone signed, a copy of the contract.

3. Attempts to obtain a work permit

[17] Mr Kumandan commenced work in or about late March 2008. He undertook the Harcourt's salesperson's course he had been unable to attend the previous year, and performed the duties of a real estate salesperson.

[18] In a message to ERL's administration office at Pakuranga, dated 20 March 2008, the administration manager recorded that Mr Kumandan would be 'joining us' from 27 March 2007. The message noted that a 'work permit letter from Eastzone' was required and a copy of the required format was requested. ERL was proposing to engage Mr Kumandan as a 'property marketing consultant', which was the title it gave to its real estate salespeople.

[19] In a covering letter from ERL under Mr Clifton's signature, and dated 28 April 2008, the New Zealand Immigration Service (NZIS) was advised Mr Kumandan had been offered a position of property marketing consultant at its Howick office. Mr Kumandan said at the investigation meeting that he obtained advice from the NZIS that a work permit would not be granted for a real estate salesperson.

[20] What followed amounted to the parties' attempts to obtain a work permit for Mr Kumandan despite this.

[21] Mr Kumandan advised Ms Fowler that his initial approach to the NZIS for a work permit had been declined. The matter was referred to Mr Clifton. As a result of ensuing discussions Mr Clifton signed an 'Employer Supplementary Form for a Work Permit/Visa Application,' which was dated 5 May 2008. The form described Mr Kumandan's job title as 'professional assistant'. The duties were listed as including: *property appraisals, marketing, consultations and property management, legal and marketing advice re property transactions, sales, negotiations.* The position was a: *salaried personal assistant to manager @ $17.50 per hour.* Most of the form was completed either by Mr Kumandan or with his input.

[22] Mr Clifton's evidence was that Mr Kumandan reported the problem with the application for a work permit was that he was to be paid on a commission only basis, and he needed a constant income. For that reason the rate of pay of $17.50 per hour was recorded on the form. According to Mr Clifton, Mr Kumandan said that when he had attained a constant income he would be able to work as a real estate salesperson. There may be a germ of sense in this if Mr Kumandan actually indicated there would be a difficulty if he was engaged on a commission-only basis, based on an assumption that a commission-only position was not an employed position. Even so, the real difficulty was that the job of real estate salesperson did not fall within the criteria for granting a work permit under the applicable work permit policy.

[23] Mr Clifton responded at the time that, in the interim, Mr Kumandan could be employed in the role described in the employer supplementary form, or a 'salaried personal assistant'. Mr Kumandan's income would accrue until it could legally be paid to him, namely on the grant of a work permit in ERL's view. Unfortunately for the parties, it is not possible to ignore the fact that work was nevertheless being done throughout the several months during which payment accrued. Withholding any payment until payment could 'legally' be made was a misconceived approach.

[24] A further letter signed by Mr Clifton and dated 26 June 2008 informed the NZIS that the position had only been offered on 28 April - implying that although an offer had been made the position had not yet commenced. The letter went on to advise the NZIS that a work permit was being awaited. This time the position to which Mr Kumandan would be appointed was described as 'professional assistant.' As with most of this correspondence Mr Kumandan said he and the administration manager prepared the letter. Mr Clifton accepted that he signed it.

[25] The further application for a work permit on the basis that Mr Kumandan was to be a 'salaried professional assistant' was also declined, by letter dated 14 August 2008. The letter recorded that the application was being assessed under general work permit policy, and advised that the application was declined because the NZIS was not satisfied there were no New Zealand citizens or residents available to do the work offered.

[26] This prompted a letter to the NZIS dated 20 August 2008, again signed by Mr Clifton. The letter said the person sought was someone who had: *advanced skills in property, real estate, marketing and possibly a general legal background, with the sole purpose of giving input to the already slumped property market.* It said: *we have sought suitable applicants for this post and have been unable to find a New Zealand citizen.* The position described in the letter was not the clerical position advertised the previous October.

[27] ERL's response satisfied the NZIS. A work permit was issued on 28 August 2008. The terms of the permit were that Mr

Kumandan: 'may *work as a Professional Assistant for Eastzone Realty Ltd MREINA (Harcourts) in Howick in Auckland.'* Although Mr Kumandan may have had the attributes described in the 20 August letter, and may have been engaged to give 'input into the already slumped property market' this does not affect the fact that his work had been, and on receipt of the permit continued to be, materially that of a real estate salesperson.

[28] Mr Kumandan performed so well that he received a Harcourts 'rookie of the year' award for the Northern region.

4. Effect of the grant of the work permit

[29] By letter dated 1 September 2008, and signed by Ms Fowler, ERL advised Mr Kumandan: ... *we confirm we are satisfied that you have received the relevant work permit to commence employment immediately.* This letter was said to have been intended to trigger Mr Kumandan's right to claim the payments that had been accruing for him since March. It was also intended to implement Mr Clifton's and Ms Fowler's belief that Mr Kumandan was to be engaged as an independent contractor upon gaining his work permit.

[30] In further support of its view that the relationship of principal and independent contractor commenced at that point, ERL relied on the facts that at or about the same time Mr Kumandan completed a tax declaration form with the tax code WT, and notified a GST number. Mr Kumandan said he did so on the advice of the administration manager and has never completed a GST return. In a further document dated 29 April 2009 Mr Kumandan signed his acceptance of an offer of professional indemnity excess cover for 2009 - 2010. That document described him as an independent contractor.

[31] Mr Kumandan's pay advice slips contained an eclectic mix of descriptions of payments and the associated tax arrangements. However payment was at least clearly and expressly calculated with reference to commissions on identified sales, and not at a rate of $17.50 per hour. Despite the description of the tax deductions as PAYE deductions, the deductions were made at the WT rate.

[32] The parties' relationship ended on 2 September 2009, in circumstances which form the basis for Mr Kumandan's personal grievance.

**Determination**

1. The law relating to real estate salespeople as employees

[33] Section 51A of the Real Estate Agents Act 1976 applied at the relevant time. The section provides that, if a real estate agent and a salesperson agree expressly that the relationship between them should be that of employer and independent contractor, then the salesperson is for all purposes deemed to be engaged by the agent under a contract for services.[1]

[34] Section 6 of the Employment Relations Act 2000 sets out at ss (2) and (3) the approach to be taken to determining whether one person is employed by another as an employee. Subsection (4) says these provisions do not limit or affect the Real Estate Agents Act 1976. Accordingly if s 51A of the Real Estate Agents Act applies, it is not necessary to apply the tests set out in s 6 (2) and (3) of the Employment Relations Act.

[35] Thirdly, a judgment of the Court of Appeal in *Challenge Realty Limited v Commissioner of Inland Revenue*[2] may apply if s 51A does not apply.

[36] The Court found that, even aside from an application of the usual indicia of an employment relationship[3], the scheme of the Real Estate Agents Act 1976 meant a real estate salesperson was necessarily an employee of the real estate agent who

engaged the salesperson (as those positions were defined in the Act). Section 51A of the Act was passed in response to this finding. Accordingly in the absence of an express agreement of the kind described in s 51A, an application of the *Challenge Realty* decision would mean the salesperson was an employee.

[37] Finally, I record that neither party has raised any matter within the Authority's jurisdiction under s 162 of the Employment Relations Act, nor any matter arising under s 4 of the Act.

2. Whether employment relationship existed at time of termination

[38] Both parties' positions were advanced with reference to the above considerations. That is, Mr Kumandan denied there was an express agreement that he be engaged as an independent contractor or that s 51A applied, and said an application of the indicia of an employment relationship support the conclusion that his relationship with ERL from the outset was one of employment. He pursued this in the face of his acknowledgement that ERL told him it engaged real estate salespeople as independent contractors, the extent of the input he had into the way in which ERL represented the position to the NZIS, and the acknowledgement that in practice he worked throughout essentially or 'unofficially' as a real estate salesperson.

[39] Mr Kumandan sought to characterise the employer supplementary form forwarded to the NZIS as the parties' employment agreement. The form itself was not an employment agreement, although its contents might amount to evidence in support of alleged terms of an employment agreement.

[40] In that regard the duties recorded in the form were materially those of a real estate salesperson, and were the duties being carried out. The position title was nothing more than a title, although to some degree the arrangement also reflected aspects of Mr Kumandan's professional background which enhanced his value to ERL as a real estate salesperson. Payment at the rate of $17.50 per hour was not intended to be made until the permit was granted, and even then the payment was to be on a backdated basis. Otherwise, however, $17.50 per hour was the agreed 'interim' rate of pay and it was agreed that the 'interim' arrangement was to be one of employment.

[41] To the extent that Mr Kumandan's argument that he was an employee throughout his association with ERL relies on terms embodied in the material produced to the NZIS - particularly in the employer supplementary form - I do not accept that the arrangement extended that far. Once the permit was granted Mr Kumandan was to, and did, revert to commission-based payment. The position of employed 'salaried personal (or professional) assistant' was not intended to continue beyond the granting of a work permit. The arrangement was entered into in the manner it was in order to assist Mr Kumandan to obtain a work permit.

[42] For its part ERL relied on the written but unsigned agreement - which I have not accepted as evidence of an express agreement - and said that there was in any event express agreement that Mr Kumandan was engaged as a contractor from the time of the grant to him of a work permit.

[43] I have accepted that the parties made an interim arrangement in the nature of an employment relationship pending the grant of a work permit to Mr Kumandan, but not that the interim arrangement was intended to continue beyond the date of the grant. As for whether I should find that a relationship of principal and contractor commenced with the grant of the work permit, some of the conduct of both parties in respect of the work permit has been confused and some has been arguably unlawful. The matters I have heard do not reflect well on either of them.

[44] Regarding ERL's position, among other things whether or not he sighted the work permit Mr Clifton should at least have expected it to reflect the description given to the NZIS of the work Mr Kumandan was to do. Regardless of any reliance on information Mr Kumandan may have provided, both he and Ms Fowler should at least have thought more carefully before assuming in effect that the terms on which the permit was granted could be varied unilaterally and immediately on the grant of the permit. The permit was not a backward-looking regularising of the parties' relationship to date, it was forward-looking permission to commence the relationship specified in it.

[45] However the question for the Authority is one of the content of the parties' agreement, and not for example of the lawfulness of their arrangements or their conduct in an immigration context. Accordingly despite the way in which the parties' arrangement was portrayed for immigration purposes, for the reasons set out I find the true nature of their agreement was that Mr Kumandan was engaged as a real estate salesperson and that that there was express agreement that he be engaged in the capacity of an independent contractor once he received his work permit. I find further that the parties' conduct at the time the permit was granted was consistent with such an agreement.

[46] For these reasons I conclude that Mr Kumandan was engaged as an independent contractor from 1 September 2008. He was not an employee for the purposes of his personal grievance and the Employment Relations Authority cannot take that matter any further.

**Costs**

[47] Costs are reserved.

[48] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

---

[1] Ss (1) and (5).
[2] [1990] 3 NZLR 58.
[3] The indicia were applied in the decision under appeal, where an employment relationship was found to exist.

---