

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 224  
5560474

BETWEEN

JUNNAN LI  
Applicant

A N D

DEPENDABLE PROPERTY  
MANAGEMENT LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Richard Zhao and Daniel Zhang for the Applicant  
Mere King for the Respondent

Investigation Meeting: 28 July 2015

Submissions Received: 20 and 28 July 2015 from the Applicant  
22 and 28 July 2015 from the Respondent

Oral Determination: 28 July 2015

Record of Oral  
Determination: 31 July 2015

---

**DETERMINATION OF THE AUTHORITY**

---

- A. The Authority does not have jurisdiction to investigate Mr Li's claims. Mr Li was at all times an independent contractor and was not an employee.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] The employment relationship problems raised by the applicant are:

- a) that Mr Li is owed outstanding commission payments;
- b) that Mr Li was unreasonably made to pay legal fees for a case involving him as the respondent's agent;

- c) that Dependable Property Management Limited (Dependable Property) owes Mr Li for outstanding annual holidays;
- d) Mr Li was unjustifiably constructively dismissed; and
- e) that the restraint of trade clause in the written agreement (the agreement) is unreasonable.

[2] By agreement, the Authority is determining as a preliminary matter whether Mr Li is an independent contractor or an employee.

### **Background facts**

[3] In May 2009, Mr Li approached Mr Nordstrand and engaged Dependable Property to find new tenants for his investment property.

[4] In June 2013, Mr Li approached Mr Nordstrand seeking work opportunities which culminated in him commencing work with Dependable Property on or about 17 June 2013.

[5] On 11 July 2013, the parties signed an agreement which sets out the terms applying to Mr Li's engagement. The agreement states that Mr Li is contracted as an independent contractor and requires Mr Li to register as an independent contractor under s.51(2) of the Goods & Services Tax Act 1985. The agreement specifically excludes the payment of redundancy or any compensation for inability to work because of ill health or holidays.

[6] In October 2013, Mr Li, through his accountant, submitted a GST return and provided his accountant with information relating to expenses to be claimed in his tax return. The expenses included car insurance, petrol, entertainment and power, water and internet facilities at his home.

[7] On 22 January 2014, the parties signed a new agreement in which there were differences between the new agreement and the old agreement. The differences between the two agreements are that Schedule A of the 22 January agreement states that the Smart phone issued to Mr Li was to remain the property of Dependable Property upon termination "... *this employment contract*".

[8] Schedule A sets out the remuneration payable as being a commission based on letting fees and listings which increased by 10% from the previous agreement signed by the parties.

[9] The new agreement required Mr Li to supervise and support the employee team and required Mr Li to take out and keep current professional indemnity insurance policies necessary for the protection of himself as general manager in Court proceedings resulting from the pursuance of his duties (or breach under the agreement).

[10] On 23 April 2014, Mr Li changed the name of the company in which he is named as the sole shareholder and director from Skysnap Elevated Photography Limited to Fast Rental Limited.

[11] On 26 March 2015, Mr Li set up an account under the user name “Fast Rental” with Trade Me. Between 1 and 21 April 2015, Mr Li listed 10 properties for rent on Trade Me.

[12] On 14 April 2015, Mr Li resigned from the role of General Manager.

[13] On 30 April 2015, Dependable Property was successful in gaining interim injunctive relief against Mr Li with respect to restraint of trade, confidentiality and non-solicitation provisions set out in the agreement signed by the parties on 22 January 2014. Before issuing interim orders, Justice Asher stated that he had not finally determined the issue of whether Mr Li was an independent contractor in his decision.<sup>1</sup>

[14] Mr Li left Dependable Property on 14 April 2015.

### **Issues**

[15] The only issue for the Authority to determine is whether Mr Li is an employee or an independent contractor.

[16] Mr Li says the following things demonstrate that he was an employee:

- a) The wording in the agreement is inconsistent, with some aspects suggesting it is an employment relationship;

---

<sup>1</sup> *Dependable Property Management Limited v Junnan Li & Fast Rental Limited* [2015] NZHC 916.

- b) The agreement makes reference to the Real Estate Agents Act 1976 which was repealed in 2009 and replaced by the Real Estate Agents Act 2008 which applies to licensed real estate salespersons who engage in the sale and purchase of real property;
- c) In practice, the relationship operated as an employment relationship;
- d) Mr Nordstrand heavily controlled the processes and forms used by Mr Li and clients formed contractual relationships with Dependable Property;
- e) Mr Nordstrand personally conducted interviews, made final hiring decisions, and marketing ideas required Mr Nordstrand's approval and payment of commissions and expenses reimbursements were approved by Mr Nordstrand and Mr Nordstrand monitored Mr Li's email and mobile phone;
- f) The work undertaken by Mr Li was fully integrated into Dependable Property's business;
- g) Mr Li was unable to take new clients with him when he left and could not develop his own business;
- h) It is industry practice to engage property managers as employees and not as independent contractors;

[17] Mr Li says he signed the agreement with Dependable Property but did not understand the difference between being an independent contractor and an employee. Mr Li also says he simply did what his accountant asked of him but did nothing more than that.

### **The law**

[18] Whether Mr Li was an employee or an independent contractor is determined under section 6(1) of the Employment Relations Act 2000 (the Act) which states:

In deciding for the purposes of sub-section (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.

[19] Section 6(3) states:

For the purposes of subsection (2) the Court or the Authority must consider all relevant matters including any matters that indicate the intention of the parties and is not to treat as a determining matter any statement by the persons that describe the nature of the relationship.

[20] Both Counsel have referred me to *Bryson v Three Foot Six Ltd*<sup>2</sup>, the leading case in New Zealand which sets out the test for determining whether an individual is an employee or an independent contractor. Both Counsel have referred me to various cases in which the Employment Court has summarised the applicable principles to be derived from the judgment of the Supreme Court in *Bryson* from earlier judicial decisions. These are:

- a) The Court must determine the real nature of the relationship;
- b) The intention of the parties is still relevant but no longer decisive;
- c) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;
- d) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the fundamental test. The fundamental test examines whether a person performing the services is doing so on their own account;
- e) Another matter which may assist in the determination of the issue is industry practice although this is far from determinant of the primary question.

[21] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test. It is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.

[22] In *Brunton v Garden City Helicopters Ltd*<sup>3</sup>, the Employment Court was faced with a worker who had held a pivotal role of operations manager who had made a substantial contribution to the development and operation of the respondent's business. In that case, the Court observed that the substantial contribution made by the operations manager to the business was simply part of the work he performed and

---

<sup>2</sup> [2005] ERNZ 372

<sup>3</sup> [2011] NZEmpC 29.

did not bear on his status. The Court determined that the work involved could have been performed by an independent contractor or by an employee<sup>4</sup>. The Court held that the real nature of the relationship, despite the senior management role, was that of an independent contractor and not an employee.

### **Intention of the parties**

[23] The intention of the parties was not clearly expressed until the agreement was signed on 11 July 2013. Mr Li did not raise any concerns over the wording of the agreement. The wording of the agreement, while containing clauses that could be seen as portraying an employment relationship, is more indicative of a contracting relationship. In particular, the following clauses have been taken into account:

- a) Clause 1.1 refers to the agreement being a “contract for services”;
- b) Clause 2.1 refers to Mr Li being contracted as an independent contractor;
- c) Clause 2.1 refers to the Real Estate Agents Act 1976 which expressly provided for salespersons covered by that Act to be able to expressly agree with the principle that they were engaged as an independent contractor. While the Real Estate Act 1976 has been repealed, the reference to this Act is evidence of the belief and intent by Mr Nordstrand that the parties were entitled to agree that Mr Li was an independent contractor and that the agreement would be legal, final and binding;
- d) Clause 2.1 requires Mr Li to register forthwith as an independent contractor pursuant to s.51(2) of the Goods & Services Act 1985 which is consistent with a contractor relationship;
- e) Clause 2.1 provides that Mr Li is not entitled to employee entitlements such as redundancy or any compensation for his inability to work due to ill health or for any holidays taken by him whatsoever;
- f) Clause 2.3 provides that for services rendered under this independent contractor’s agreement, the company will pay the property manager commission at the rates attached;

---

<sup>4</sup> Ibid at [71].

- g) Clause 3.3 provides that Mr Li is responsible for his own professional indemnity insurance;
- h) Clause 6.1 provides that Mr Nordstrand could terminate the agreement if Mr Li did not maintain the level of income agreed when entering into the agreement;
- i) Schedule A to the agreement sets out the percentage of fee and commission Mr Li would be paid for the services he provided as a contractor. The rates are expressly provided to be a percentage of the GST-inclusive fee collected from listings, management and other fees brought in by Mr Li.

[24] In the main, the agreement is consistent with the discussions Mr Li and Mr Nordstrand held prior to Mr Li's commencement. At the investigation meeting, Mr Li accepted he had approached Mr Nordstrand for a job and was keen to start a new career path. Mr Li wanted Mr Nordstrand to teach him the business of property management.

[25] Mr Li had significant contacts in the Chinese community which made up a significant percentage of the Chinese property investors in Auckland and he would be in a good position to help grow Dependable Property with the right teaching. He had to start from scratch and establish his own portfolio and clients and would be paid nothing but there would be no loss to DPML, however, if he did well, both he and Dependable Property would benefit.

[26] Mr Li told the Authority that when he signed the agreement he did not know what he was signing. Mr Li had the agreement for about two weeks before he signed it. When signing the agreement, Mr Li confirmed that he had read and understood the agreement, had been advised of his right to seek independent advice and had been given a reasonable opportunity to do so.

[27] Mr Nordstrand was clear about his intention that Mr Li be engaged as an independent contractor and the agreement he wrote largely reflected that intention. Mr Li was not as clear about his intention. At the time of his engagement, his intention was to develop a career in the property management industry but did not give much thought to whether that would be as an employee or an independent

contractor. When he signed the agreement, Mr Li agreed to its terms which included that he was to be engaged on the basis of being an independent contractor.

### **The control test**

[28] This test determines the extent to which the activities of Mr Li were controlled by Dependable Property.

[29] Mr Li could manage his own hours as there were no limitations or restrictions placed on him as to how many hours he worked each week or on which days he worked. He was not subject to any form of performance monitoring.

[30] Mr Li says Mr Nordstrand controlled everything he did and monitored his emails. I am not satisfied that Mr Li was subject to such scrutiny as he has outlined. Mr Nordstrand discovered after Mr Li had left that Mr Li had altered forms which set out the terms of tenancies including obligations on termination and for debt recovery. Mr Li had established and was using his own Excel spreadsheet for his listings and he was able to access the data systems from anywhere and was not required to work at Dependable Property's office.

[31] The control test does not assist greatly in deciding whether or not Mr Li was an employee or a contractor although its analysis points to Mr Li being free to work hours which suited him and could carry out his work from whichever location suited him.

### **The integration test**

[32] This test examines the extent to which Mr Li was integrated into Dependable Property's business.

[33] Mr Li was working exclusively to grow and manage the business of Dependable Property. Without his work, Mr Nordstrand would have continued to work solely for his company but it is not clear whether he would have achieved the growth Mr Li achieved for him.

[34] I liken Mr Li's position to that of a franchisee. He had the benefit of using Dependable Property's brand, forms and processes without having to set them up himself. He benefited financially but so too did Dependable Property, but to a much lesser extent.

[35] The integration test does not appear to be strongly determinative of Mr Li's status one way or the other.

### **Fundamental test**

[36] This test examines the extent to which Mr Li took on financial risk himself in providing his services to Dependable Property.

[37] When Mr Li entered into the relationship with Dependable Property, he did so on the basis that if he did not bring in new clients, he would not be rewarded for his work by way of commission payments. This was a risk to Mr Li. In order to receive payment, he had to secure new clients.

[38] From the date he commenced with Dependable Property, Mr Li maintained a spreadsheet of all clients and work undertaken. This spreadsheet was used to claim his commissions each week. Mr Li received gross payments from Dependable Property with no tax deducted.

[39] The records provided to the Authority show Mr Li had claimed business-related expenses in his tax return and filed regular GST returns. This indicates that he was in business on his own account.

[40] Mr Li never raised any concerns with Dependable Property during his relationship that he had not received paid holidays or sick leave. Mr Li took responsibility for accounting for his own tax and income to IRD. In doing that, he was able and did claim expenses not available to employees such as power, internet and water for his home office.

[41] Mr Li submitted IRD returns for the period 1 October 2014 to 31 March 2015 which indicates that during that period he was operating his Fast Rental business which also coincides with the period during which Mr Li was working for Dependable Property.

[42] Mr Li was not able to retain the clients he brought into the business. Those clients belonged to Dependable Property.

[43] The fundamental test has strong elements of a contracting relationship but also some elements of an employment relationship.

### **Industry practice**

[44] An indication provided through emails by Mr Li indicates that the industry generally engages property managers as employees and not as independent contractors. The evidence was not able to be tested in the Authority and I have given it little weight.

[45] Mr Nordstrand gave evidence of his experience in the industry which indicates that it is not unusual to have either independent contractors or employees acting as property managers.

[46] The evidence of industry practice is not conclusive.

### **Overall impression**

[47] The decision as to whether Mr Li was an employee or an independent contractor is finely balanced. The overall impression from all of the facts in this case of the underlying and true nature of the relationship between Mr Li and Dependable Property is that of an independent contractor.

[48] Mr Li accepted responsibility at all times for the payment of his own tax and benefited from being able to write-off expenses relating to his vehicle and home office. Mr Li undertook his work without any close supervision and worked his own hours. He provided to Dependable Property itemised Excel spreadsheets each week to claim his commission payments which were inclusive of GST.

[49] I do not accept Mr Li's evidence that he lacked understanding when entering into the agreement and when filing his tax returns. This is because Mr Li is an intelligent young man who has completed a Business Management Degree and a Masters' Degree in Business Management in New Zealand.

### **Determination**

[50] As a result of my findings, the Authority does not have jurisdiction to investigate Mr Li's claims. Mr Li was at all times an independent contractor and was not an employee.

### **Costs**

[51] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Dependable Property will have 28 days from the date of this

determination in which to file and serve a memorandum on the matter. Mr Li will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell  
Member of the Employment Relations Authority