

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 228/07
5073145**

BETWEEN JOSEPHINE MATICH
 Applicant

AND FAIRFAX NEW ZEALAND LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Richard Harrison for Respondent

Investigation Meeting: 14 March 2007

Further information: 1 May 2007
 6 June 2007
 20 July 2007

Determination: 1 August 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Josephine Matich (“Ms Matich”) says she was unjustifiably dismissed by Fairfax New Zealand Limited ("Fairfax") when it wrote to her by letter dated 8 November 2006.

[2] Frequently persons engaged under written contracts where they are explicitly expressed to be engaged as independent contractors only take issue with that designation after the contract comes to an end. Ms Matich tells the Authority that she was not an independent contractor, rather, she was an employee who has been unjustifiably dismissed. Fairfax resists Ms Matich's claim because it says Ms Matich was not an employee.

[3] Ms Matich and Fairfax were unable to resolve their differences by mediation.

Employee or independent contractor?

[4] It is first necessary to find whether Ms Matich was an employee.

[5] The Authority must determine the real nature of the relationship between Ms Matich and Fairfax. The intention of the parties is relevant but is no longer decisive. Statements by the parties, including contractual statements are not decisive either. 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. Industry practice is of assistance but is not determinative of the primary question.

The relationship in practice

[6] Ms Matich had first been asked by Mr Peter Martin ("Mr Martin") the co-owner of the publication *Dargaville & District News* to work as a commission only sales representative. It suited both parties for Ms Matich to be remunerated by a 20% commission. She worked her own hours using her own vehicle. Ms Matich invoiced the company for her commissions. This arrangement continued through various owners of the publications Ms Matich sold advertising for.

[7] On 24 May 1999 Ms Matich signed a "commission contract" with *The News Limited* the owner of the publication at that time. The contract provided:-

1. *Your contract is that of a commission-only sales representative, commencing with The News Limited on ...*
12. *Nothing in this contract shall be construed as creating or being deemed to create a master/servant relationship as between the Company and you.*

[8] When Fairfax took over the publication, Ms Matich and Fairfax entered into an *Independent Contracting Agreement* dated 5 December 2005. The agreement contained these terms:-

2.2 General Role:

2.2.1 Priority of Service: Even though the Contractor and the parties listed in schedule B may work for other companies from time to time, they shall always give the Company priority in the use of their services.

2.2.4 The Contractor shall provide equipment sufficient to perform the services to be rendered pursuant to this agreement and the equipment shall be replaced and maintained entirely at the cost of the Contractor.

3. *INDEPENDENT CONTRACTOR*

3.1 *Not an Employee: The Contractor is in all respects an independent contractor and not an employee or partner or subsidiary of the Company and is not entitled to pledge the credit of the Company. The Contractor shall be solely liable for all of its debts, losses, expenses and taxation on its income.*

3.2 *No Claim an Employee: The Contractor agrees that at no stage either during or subsequent to the termination of this agreement will the Contractor and/or its employees (including, in particular, the parties listed in schedule B) claim that it or they are or were an employee of the Company.*

[9] Before she signed this agreement, Fairfax informed Ms Matich it preferred to contract with her as an employee. I find that Ms Matich took some time to consider the matter but after taking advice and some considered deliberation, she advised Fairfax she preferred the situation to remain as it was.

[10] Ms Matich says she was an employee for eight years. She denies that she ever worked from home and says that she used a company car to visit clients south of Dargaville as Mr Martin liked the company flag to be flown in those areas. She says that because of a lack of computers at the office, she occasionally had clients direct emails to her home computer. She explains that Mr Martin would direct her on a regular basis when there was a feature to sell and would often ask her to call different advertisers for different reasons. She says staff in the office worked together to complete a task often covering for each other when sick, on leave or when out of the office. She denies that she was free to sell advertising for other publications.

[11] I find that in practice, the arrangement between Ms Matich and Fairfax worked as follows. Ms Matich sold advertising on a commission only basis. She invoiced Fairfax each week for 20% commission. She did not work set hours and although she did work from Fairfax's offices, she was not required to report to that office and nor did she have any set hours of work. She was free to work from home if she wished although she did not do so. Fairfax did not provide Ms Matich with any tools of trade or any equipment to sell advertising. Ms Matich did not take instruction from any direct superior as to how she was to sell advertising.

The intention of the parties

[12] I find that the intention of both parties at all material times was that Ms Matich was an independent contractor. That arrangement always suited both parties. In December 2005 when she was expressly asked to consider being an employee, she duly considered that question after taking advice from her husband and friend but she rejected the offer preferring instead the existing position as an independent contractor. Although not the decisive test, this aspect of matters is persuasive.

Control

[13] There is not the degree of control which typically characterises an employment. Ms Matich had no set work hours. She was not directed as to how she sold advertising. She was not obliged to report to work at Fairfax's office and she was free to work from home although it is accepted she did not do so.

Integration

[14] I find too that as commission only sales representative, Ms Matich was not an integral part of the Fairfax's operation in the publication and her engagement as such was only an adjunct function of Fairfax's operation.

Fundamental

[15] Ms Matich bore a business risk in the sense that if she did not sell any advertising, she was not paid. She had her own accountant and took advice from that accountant as to her business and financial affairs. I find that Ms Matich was operating from the basis of her own business operation and she was in business on her own account.

[16] The contractual arrangement between Ms Matich and Fairfax was not an arrangement which was imposed upon an unsuspecting and unsophisticated person. Ms Matich entered into the arrangement appreciating all the costs and benefits and the advantages and disadvantages. She took advice and entered into the final independent contractor agreement. She explicitly rejected the proposal to be an employee. Now however, that voluntary election inconveniences her.

[17] Having structured her affairs to her considered advantage as an independent contractor, Ms Matich must now accept the result. Taking the above considerations into account, the intention of the parties, the control, integration and fundamental tests, I conclude that Ms Matich was in business for herself and was not an employee of Fairfax New Zealand Limited. Accordingly it is not open to Ms Matich to proceed with a personal grievance.

Costs

[18] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Harrison is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Match is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority