

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jon McCarron (Applicant)
AND Reynolds Realty Limited (Respondent)
REPRESENTATIVES Jon McCarron In person
R Wood, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 10 January 2006
DATE OF DETERMINATION 9 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jon McCarron says his former employer Reynolds Realty Limited (“RRL”) unjustifiably dismissed him on the ground of redundancy. He also says he did not receive his final pay, and complains that he never received a written employment agreement.

[2] Reynolds Realty Limited (“RRL”) says it was not in an employment relationship with Mr McCarron, rather the relationship was one of principal and contractor. It denies any final payment is outstanding and says Mr McCarron’s association with RRL was ended lawfully when the LJ Hooker franchise under which RRL conducted its business was sold.

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

[4] In addition Mr Wood, who represented RRL and is its accountant, advised that RRL has ceased trading, has no assets and is about to go into liquidation. I addressed the implications of that with the parties at the investigation meeting, and return to the matter at the end of this determination.

Existence of employment relationship

[1] Mr McCarron began working for RRL as a real estate salesperson on or about 6 January 2004. He had no prior experience as a real estate salesperson, and was obliged to complete a brief period of training in order to obtain a real estate salesperson’s certificate of approval before he could commence working as a salesperson. He duly obtained that certificate.

[2] A month or two later Mr McCarron moved away from working as a salesperson and focussed on working as a rental property manager within RRL. Mr Wood says that work was done as part of Mr McCarron’s ‘normal land agent job.’

[3] There was no written agreement.

[4] For RRL, Mr Wood relied heavily on assertions that, as a matter of industry practice, real estate salespeople are engaged as contractors and not as employees. For present purposes I accept that a substantial majority of real estate salespeople are contractors.

[5] However there is a significant Court of Appeal judgment which bears on the matter, and was mentioned during the investigation meeting, namely **Challenge Realty Limited v Commissioner of Inland Revenue** [1990] 3 NZLR 42 (HC) and [1990] 3 NZLR 58 (CA).

[6] The background to the **Challenge Realty** case is that there was no real dispute the real estate industry had a practice of treating salespeople as independent contractors. However in 1989 the Commissioner of Inland Revenue ruled that real estate salespeople were employees of real estate agents, and not contractors.

[7] When it heard the resulting objections - even in the face of a written agreement saying a particular salesperson was a contractor - the High Court concluded:

- (a) An important criterion was the extent to which one party was under the direction and control of the other regarding the manner in which work was done – with the relative lack of control and supervision of the salespeople concerned tending to point to an independent relationship rather than one of employment;
- (b) Applying the integration test, the salespeople had to be part and parcel of the business of the real estate agent on whose behalf they acted;
- (c) Applying the fundamental test, the salespeople could not be regarded as running their own business;
- (d) The expressed intention of the parties (if there was one) was not determinative; and
- (e) The factors pointing to the existence of an employment relationship outweighed those pointing to an independent contractor's relationship.

[8] The scheme of the Real Estate Agents Act 1976 was an important consideration, particularly with reference to the factors set out in (b) and (c) above. To summarise very broadly, the Act prevents any person from carrying out the business of a real estate agent unless that person is licensed under the Act¹. The holding of a licence authorises the licensee to carry out the business of a real estate agent at the place of business endorsed on the licence². A licensed real estate agent can employ or engage a person holding a certificate of approval as a salesperson³. Thus, under this structure, it is not possible for a person who sells real estate, but is not a licensed agent, to be in business for him or herself. The salesperson must be part and parcel of the agent's business.

[9] On the appeal the Court of Appeal focussed even more strongly on the Real Estate Agents Act than the High Court had done, and went through the provisions of the Act in some detail. It found the Act required effective control by agents of salespeople. It also found that salespeople were entirely dependent on the relationship with the real estate agent for whom they worked when dealing with vendors and purchasers. They were employees.

[10] This outcome led to an amendment in 1992 to the Real Estate Agents Act 1976. Section 51A of the Act as amended provides in part:

“(1) This section applies to a salesperson and a real estate agent at any time if –

¹ s.16

² s 26

³ s 42 and 46

- (a) ...; or
 - (b) Before that time and after the commencement of the Real Estate Agents Amendment Act 1992, they agree expressly that the relationship between them at that time should be that of employer and independent contractor.
- (2) ...
- (5) At a time after the 31st day of March 1992 when this section applies to a salesperson and a real estate agent, the salesperson shall for all purposes be deemed to be engaged by the agent under a contract for services.”

[11] Thus the deeming provision in (5) applies if the parties expressly agree that their relationship is one of employer and independent contractor.

[12] Here, Mr Reynolds told me he ‘took it for granted’ that salespeople were self employed. However there was no evidence of the express agreement referred to in s 51A of the Real Estate Agents Act. Without it, s 51A does not apply. The best Mr Reynolds can say is there was an implied agreement that Mr McCarron was a contractor, which I do not accept on the evidence, and in any event an implied agreement is not enough.

[13] That brings me back to the evidence about how the parties’ relationship operated in practice. Regarding Mr McCarron’s activities as a real estate salesperson, the evidence I heard did not differ in essence from the evidence the High Court discussed in the **Challenge Realty** case. Were it not for the scheme of the Real Estate Agents Act there might be scope for saying factors such as a relative lack of control over a particular real estate salesperson’s activities meant the salesperson was a contractor rather than an employee. However, as the courts found in **Challenge Realty**, the scheme of the Act created an element of control, and prevented salespeople from running their own business, to the extent that the salespeople were employees.

[14] Accordingly, in deciding the present case I consider myself obliged to follow the **Challenge Realty** cases and conclude that, in the absence of a written agreement specifying otherwise, the structure imposed by the Real Estate Agents Act means Mr McCarron was an employee.

The next step

[15] As I told the parties before the investigation meeting, and at its commencement, my investigation was to address the preliminary matter of whether Mr McCarron was an employee or not. If I found he was not, I could not take his remaining claims any further. That meant that if, for example, RRL owed him money, he would have to pursue that claim elsewhere. Because I was addressing the preliminary matter only, I did not seek evidence in respect of the redundancy or the monies allegedly owed. I also told the parties that, if I found Mr McCarron was an employee, those matters would be addressed at a new meeting convened for the purpose.

[16] However there was another matter which I considered should be addressed, namely RRL’s financial circumstances. In discussions during the investigation meeting I explained to Mr McCarron that if RRL went into liquidation, then in the absence of the appropriate permission he would not be able to pursue his claims against RRL whatever their merits might be. That was a matter of statute about which I could do nothing. I invited Mr McCarron, too, to consider his position in the light of the possibility that, whatever the merits of his claims might be, RRL would not have the means to meet any monetary award in his favour.

[17] With Mr Reynolds’ consent, Mr Wood indicated that he would make available to Mr McCarron financial information verifying RRL’s financial position.

[18] I told the parties I would leave that for them to address, but later found they had not taken any action on the matter. Since the role of the Authority is to resolve employment relationship

problems by establishing the facts⁴, I considered that the resolution of the problem overall may be assisted if Mr McCarron took the opportunity to satisfy himself of the facts surrounding RRL's financial position, and formally directed the parties to address the matter. In that respect, and further to its role, the Authority has the power to follow whatever procedure it considers appropriate⁵.

[19] The parties have recently complied with that direction, and Mr Wood has provided further details of RRL's financial position. Notably he says that the IRD had filed a notice to put the company into liquidation, although I understand the position between RRL and the IRD has been the subject of an arrangement which means that particular matter will not proceed. RRL is still, however, facing the prospect of liquidation.

[20] That has been RRL's position all along, the implications were explained to Mr McCarron months ago, and Mr McCarron did not take the opportunity to satisfy himself about RRL's financial circumstances until I directed him to. He must take any consequences.

[21] Mr McCarron now purports to require the Authority to proceed and issue a decision on the matters before it, including his substantive claims. Were it not for the apparent inevitability of a liquidation I would refer this problem to mediation, to enable the parties to address the problem in the light of my finding Mr McCarron was an employee.⁶ Instead, however I will accord urgency to the matter and proceed to investigate and determine the merits.

[22] A support officer will contact the parties to arrange a meeting to that end. For the parties' information, although Mr McCarron provided a new quantification of his claims on 8 March 2006, I require evidence bearing on the circumstances of his redundancy before I can determine whether he has an entitlement to the remedies sought in relation to lack of good faith, injury to feelings and loss of income associated with the redundancy. For the parties' further information, claims for costs of representation, the filing fee in the Authority and petrol and parking costs are dealt with after a determination has been made and will not be part of the investigation.

Costs

[23] Costs are reserved pending the final resolution of this problem.

R A Monaghan
Member, Employment Relations Authority

⁴ Employment Relations Act 2000 s 157

⁵ s 160(1)

⁶ under s 159 of the Employment Relations Act