

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 73
5414546

BETWEEN JOANNE MURPHY
 Applicant

A N D THE MARKETING TEAM
 (RECRUITMENT) LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell, Counsel for Applicant
 Scott Leith, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 12 December 2013 from Applicant
 22 January 2014 from Respondent
 07 February 2014 from Applicant

Date of Determination: 04 March 2014

DETERMINATION OF THE AUTHORITY

A Joanne Murphy has failed to discharge the onus of establishing the parties were in an employment relationship so the Authority does not have jurisdiction to investigate her Statement of Problem.

Employment relationship problem

[1] Ms Murphy claims she was employed by The Marketing Team to provide marketing services and that she is owed wage arrears of \$11,960 being eight weeks' together with \$2,317 for unpaid work.

[2] After Ms Murphy's work with The Marketing Team ended, Ms Murphy and the director of The Marketing Team Ms Megan Denize had an exchange of correspondence about the payment of Ms Murphy's invoices during which

Ms Murphy disputed the notice period applied under the termination clause of the applicable Services Agreement(s).

[3] When that issue was not resolved to Ms Murphy's satisfaction, she engaged counsel who sent Ms Denize a letter dated 05 March 2013 which raised for the first time Ms Murphy's belief that she was an employee and not an independent contractor.

[4] Ms Murphy says she was employed by The Marketing Team as a freelance marketer with the terms of her engagement being set out in a Services Agreement. Ms Murphy says that despite the terms of the Services Agreement describing her as an independent contractor, the parties were in fact in an employment relationship because the real nature of the relationship between the parties was one of employee/employer.

[5] The Marketing Team maintains that Ms Murphy was only ever an independent contractor and never an employee. Ms Megan Denize was the director of various The Marketing Team entities which engaged Ms Murphy as a freelance marketing manager in the period relevant to this dispute. Ms Denize's evidence is that Ms Murphy was engaged by three different divisions of The Marketing Team:

- (a) The Marketing Team Limited from 16 January 2012 until 31 March 2012;
- (b) The Marketing Team (Consultants) Limited from 1 April 2012 until 22 February 2013; and
- (c) The Marketing Team (Recruitment) Limited from 1 April 2013 until 22 February 2013.

[6] The terms of Ms Murphy's engagement were set out in five separate Services Agreements with the three entities named above, in particular:

- (a) The Marketing Team Limited – dated 20 December 2011;
- (b) The Marketing Team (Consultants) Limited – dated 28 March 2012;
- (c) The Marketing Team (Recruitments) Limited – dated 28 March 2012;
- (d) The Marketing Team (Consultants) Limited – dated 29 October 2012;
and

(e) The Marketing Team (Recruitment) Limited – dated 29 October 2012.

[7] All five Services Agreements contain a materially similar clause which states that Ms Murphy was an independent contractor:

The parties agree that it is their mutual intention that the real nature of the relationship is that of the principal and independent contractor and that the contractor is not an employee or agency of the company. The parties agree that while the company will oversee the services provided by the contractor, the company exerts this control only to a limited extent, over the contractor in relation to the provision of services pursuant to this agreement. The contractor shall be responsible for the contractor's own liability for tax, ACC levies and all other liabilities and expenses of whatever nature relating to the contractor and the contractor's employees (if any). The contractor hereby indemnifies and saves harmless (stet) the company from all such taxes, levies and expenses.

[8] The Authority does not have jurisdiction to investigate issues involving independent contractor arrangements. Ms Murphy therefore bears the onus of establishing on the balance of probabilities that she was in an employment relationship with The Marketing Team. If she is unable to discharge that onus then the Authority will not have jurisdiction to investigate the matters raised in her Statement of Problem.

[9] Section 6 of the Employment Relations Act 2000 (the Act) defines the meaning of “employee”. Section 6(2) of the Act requires the Authority to determine “the real nature of the relationship” between the parties. This requires it to “consider all relevant matters, including any matters that indicate the intention” of the parties¹. The Authority is not to treat as determinative any statement by the parties describing the nature of their relationship².

[10] The leading case is the Supreme Court decision in *Bryson v. Three Foot Six Ltd*³ which acknowledged that “all relevant matters” includes written and oral terms of the contract entered into between the parties together with any divergences from or supplementation to those terms were apparent from the manner in which the relationship operated in practice. The Supreme Court also observed that how the relationship operates in practice is crucial to determining its real nature and that the

¹ Section 6(3) of the Act

² Section 6(3)(b) of the Act

³ [2005] 3 NZLR 721

Authority is still to have regard to the features of the control, integration and fundamental tests which apply at common law.

Relevant documentation

[11] The parties obviously intended that Ms Murphy would be an independent contractor because that is what they agreed to in the relevant Services Agreement.

[12] In addition it is clear that the parties expressly contemplated Ms Murphy's status at the outset of their relationship because Ms Denize suggests to Ms Murphy in the offer letter dated 15 October 2011 (which preceded her first Services Agreement with The Marketing Team) that:

To give you the greatest flexibility, we recommend you join us as an independent contractor. This gives you almost infinite flexibility to choose which weeks of the year you work and take time off if you have family commitments without having to worry about sticking to a fixed number of weeks' annual or sick leave. With the exception of a regular Weekly IP, you will also have the flexibility to pick your own work hours throughout the week, and spend part of your time working from our offices and part of your time working remotely if you choose to do so.

[13] The initial letter of offer invited Ms Murphy to be an independent contractor on the basis that it gave her the greatest flexibility in choosing which weeks to work and in taking time off for family commitments and also in terms of her work hours throughout the week and work location. This suggestion must have been attractive to Ms Murphy at the time because she accepted this offer by entering into the relevant Services Agreement which clearly records that the parties intended to have an independent contracting arrangement not an employment relationship.

[14] The relevant documentation satisfies me that the parties initially intended to enter into an independent contracting arrangement and then freely and willingly executed documentation (the Services Agreement(s)) that reflected that mutual intention. This is a factor that weighs against the existence of an employment relationship but in accordance with s.6 (3) of the Act the parties' intention is not determinative of the status issue.

Tax and associated issues

[15] Clause 7.1 of the Services Agreement provides that Ms Murphy is responsible for her own tax, ACC levies and any other liabilities relating to herself and her employees (if any). This tends to support a situation where the parties contemplated that Ms Murphy would be in business on her own account. I find that the parties acted consistently with this intention because Ms Murphy invoiced The Marketing Team which did not deduct PAYE from the payments it made to her.

[16] Ms Murphy did not provide the Authority with her Inland Revenue tax returns for the relevant period on the basis these had not yet been filed. Although Ms Murphy says she did not intend to claim the tax benefits of a home office and work use of her vehicle, it was open to her to do so in accordance with the provisions of the applicable Services Agreement.

[17] The invoicing arrangement agreed by the parties at the outset and which continued to occur in accordance with that agreement throughout their association meant that the rights and benefits of an individual who is in business on their own account were available to Ms Murphy had she elected to take advantage of them. I consider this is indicative of an independent contracting arrangement.

Operation of the arrangement/ relationship in practice

[18] Ms Murphy was required to meet her own taxation and ACC levies liabilities and she was entitled to provide services to other companies outside of her role with The Marketing Team had she wished to do so.

[19] The various Services Agreements between the parties provide that Ms Murphy had differing hourly rates of pay and share of revenue provisions according to the type of services performed. Ms Murphy also reinstated her GST registration at the time she began her first contract with The Marketing Team, she kept weekly timesheets to record how her time was spent and issued weekly invoices to accompany those timesheets which then resulted in her being paid for the services she provided.

[20] Ms Murphy had considerable flexibility over her work arrangements including her hours and location of work. She was able to choose her own work hours, as reflected in her letter of offer and Services Agreement. This saw her spend part of her

time working from home, part of her time working from clients' offices and part of her time working from The Marketing Team's offices.

[21] I consider that the way the relationship operated in practice is indicative of an independent contracting arrangement. The payment and taxation arrangements and the flexibility over Ms Murphy's ability to choose her own work hours, to engage her own employees are all indicative of an independent contracting arrangement.

Control test

[22] Ms Murphy claims that The Marketing Team had a high level of control over her. She says that the work she was doing was allocated to her by Ms Denize who was also in charge of the work that Ms Murphy performed. Ms Murphy claims that Ms Denize managed her [Ms Murphy's] workload and on occasion would provide her [Ms Murphy] with weekly workflow tasks to complete which included timeframes for the delivery of the work required.

[23] I do not accept Ms Murphy's submission that The Marketing Team exerted the sort of control over her that would be a feature of, or to the level expected in, an employment relationship. I accept that Ms Denize allocated work to Ms Murphy and understandably expected that work to be returned within certain timeframes but the evidence satisfied me that Ms Murphy was free to determine her own start and finish times of work, the total number of hours worked, the days of work and she was also able to schedule time with no work, for example during school holidays had she wished to do so without requiring The Marketing Team's consent.

[24] I do not accept the fact that Ms Murphy was required to provide her services to a standard which was acceptable to Ms Denize means that The Marketing Team had a high level of control over Ms Murphy. It is consistent with a normal commercial arrangement that The Marketing Team required/expected a certain quality of work from Ms Murphy and that in some cases the work performed by her would have to be delivered within agreed timeframes. These factors do not in themselves suggest the existence of an employment relationship.

[25] Ms Murphy was free to work the hours she chose. Her invoices reflected the hours she had elected to work. She was also able to decline to do certain work that did not suit her needs at that particular time. She could also have declined work had the timeframes or quality expectations not have been acceptable to her.

[26] I therefore find that Ms Murphy was not under any close control regarding the performance of her work or the hours involved so I do not find that the control test favours Ms Murphy's claim that she was an employee.

Integration test

[27] Ms Murphy says she was shown on The Marketing Team's website as the marketing manager and that she communicated with The Marketing Team's clients through The Marketing Team's office and using The Marketing Team's email address and cell phone number. Ms Murphy says she was integrated into the business because The Marketing Team clients would have had no idea that she was an independent contractor to The Marketing Team rather than its employee.

[28] Ms Murphy also claims that because she was listed as a marketing consultant on The Marketing Team's website and was provided with a laptop, mobile phone and business cards she was so integrated into the business that she was in practice an employee. I do not accept that submission.

[29] I accept Ms Denize's evidence that the laptop, business cards, and mobile phone were all items that were provided to Ms Murphy as operational necessities to enable the services to be delivered in a way that suited and would meet The Marketing Team's clients' needs.

[30] The laptop was provided in order to protect The Marketing Team's clients' confidential information from being stored outside The Marketing Team's server. A mobile phone was provided to enable clients to reach The Marketing Team's freelancers irrespective of whether they were in the office, with another client or working from home, and in order to provide continuity of the point of contact with The Marketing Team's business when the freelancer moved on. This also operated to protect The Marketing Team's relationship with its clients and the business card was provided to record the number on which the freelancer may be reached.

[31] I do not consider that this test favours Ms Murphy's position that she was an employee.

Fundamental test/economic reality test

[32] Ms Murphy was registered for GST and she issued invoices which were paid without PAYE having been deducted. She was well aware of that and did not raise any issue about it until after there was a dispute around the notice paid as a result of the termination of the Services Agreement.

[33] Although Ms Murphy says that she did not work for any other employers and did not conduct other business (apart from catering which she said was unrelated to her marketing skills), she was free to do so. I find that although Ms Murphy only provided her services to The Marketing Team that was her own choice because she was free to pursue work elsewhere simultaneously with providing services to The Marketing Team had she wished to do so.

[34] Ms Murphy could structure her commitment to The Marketing Team to work around any other commitments/priorities/obligations she had. She had considerable freedom and flexibility to alter her work hours to accommodate any other work she wanted to do and/or personal/family commitments outside of her commitments to The Marketing Team which I find indicates she was in business on her own account.

[35] Ms Murphy had the ability to profit from her endeavours by increasing the number of hours she worked thereby increasing her income. She could also increase her income as a result of the volume of business she brought in under the “*share of revenue*” provisions of her Services Agreement. I therefore consider she had the ability to profit personally from the services she provided which weighs in favour of an independent contracting arrangement.

Outcome

[36] I find that each of the common law tests do not undermine the intentions of the parties as evidenced by their freely negotiated contractual arrangements on more than one occasion. I consider that each of the common law tests supported the common intention which was recorded in the Services Agreement that Ms Murphy would be an independent contractor not an employee. This was also the basis on which she was offered and accepted work with The Marketing Team.

[37] I find that Ms Murphy is unable to discharge the onus of establishing that she was in an employment relationship with The Marketing Team. Accordingly, the

Authority does not have jurisdiction to investigate the matters raised in her Statement of Problem so her claims are dismissed.

Costs

[38] The Marketing Team as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible then The Marketing Team has seven days within which to file its costs submissions. Ms Murphy has seven days within which to respond with The Marketing Team having a further three working days within which to reply.

[39] This timetable will be strictly enforced and any departure from it requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority