

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 125  
5328171

BETWEEN NEIL RICHARD POLLETT  
Applicant

AND BROWNS REAL ESTATE  
LIMITED  
Respondent

Member of Authority: R A Monaghan  
Representatives: N Pollett in person  
D Pine, counsel for respondent  
Investigation Meeting: 24 February 2011  
Determination: 30 March 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Neil Pollett says he has a personal grievance in that his former employer, Browns Real Estate Limited (BREL) dismissed him unjustifiably.

[2] BREL says the parties were not in an employment relationship, rather one of principal and independent contractor. The Employment Relations Authority can address problems arising in employment relationships only.

[3] Accordingly this determination concerns whether the parties were in an employment relationship or one of principal and independent contractor.

**Employee and contractor relationships in the real estate industry**

1. The Employment Relations Act 2000

[4] Section 6 of the Employment Relations Act 2000 sets out at (2) and (3) the approach to determining whether a relationship is one of employment over industries in general, but makes the following special provision:

*(4) Subsections (2) and (3) do not limit or affect the [Real Estate Agents Act 2008]...*

[5] The provision reflected the passing of the Real Estate Agents Act 2008. It previously referred to the Real Estate Agents Act 1976, which was repealed and replaced by the 2008 Act. The effect of s 6(4) is that, if there is in existence an agreement of the kind referred to in either Act, the agreement prevails on the matter of whether a real estate salesperson is an employee or a contractor, and it is not necessary to embark on the analysis that would otherwise be required.

## 2. Real Estate Agents Act 1976

[6] Material provisions of s 51A of the Real Estate Agents Act 1976 read in part:

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

*...*

*(b) ... they agree expressly that the relationship between them ... should be that of employer and independent contractor.*

*...*

*(5) ... 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.*

[7] The parties here were parties to, and both of them signed, two agreements entitled 'Salesperson Contract For Salesperson Engaged as Independent Contractor'. The first was dated October 2009 (the October 2009 agreement). It was signed by both parties before 17 November 2009 (being the date of coming into force of the 2008 Act). The agreement expressly defined Mr Pollett's engagement as being as an independent contractor, not as an employee.

[8] On the face of the matter, and if the Real Estate Agents Act 1976 was the applicable statute, from November 2009 Mr Pollett was deemed by law to be engaged as a contractor and was not an employee.

## 2. Real Estate Agents Act 2008

[9] The second agreement was dated March 2010, and was signed by the parties in late April and early May 2010 (the March 2010 agreement). It, too, provided expressly that the salesperson was engaged as an independent contractor, not as an employee.

[10] Since relevant provisions in the Real Estate Agents Act 2008 had come into force on 17 November 2009, they applied to the March 2010 agreement. In the event that the 1976 Act is not the applicable statute, these provisions also applied to the October 2009 agreement. Section 51 of the 2008 Act reads:

- (1) A salesperson may be employed by an agent as an employee or may be engaged by an agent as an independent contractor.*
- (2) Any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.*

[11] Again on the face of the matter there was a written agreement between the parties stating expressly that their relationship was that of principal and independent contractor. On the face of the matter the agreement is conclusive.

## 3. Transitional provisions

[12] The Real Estate Agents Act 2008 provides:

### *167 Salespersons and branch managers approved under Real Estate Agents Act 1976*

- (1) Every person is deemed to hold a licence as a salesperson or as a branch manager under this Act who, on the commencement of this section, holds a current certificate of approval as a salesperson or as a branch manager under the Real Estate Agents Act 1976.*

...

- (6) A person who, by this section, is deemed to hold a licence and who continues to be employed or engaged by the same agent retains the status that person had before the commencement of this section, whether as employee or independent contractor, until that status is altered by agreement of the parties.*

[13] On the face of the matter, from November 2009 Mr Pollett's deemed status of contractor was to continue until it was altered by agreement. Again on the face of the matter, while the entry into the March 2010 agreement could have altered the status of

the parties, the continued presence of an express statement that the salesperson was engaged as a contractor means no alteration in status occurred.

### **Issues put to the Authority**

[14] In the light of the above I asked Mr Pollett to address whether and how the Authority could or should look behind the agreements in order to find that there was an employment relationship. Mr Pollett's concern was based principally on the events prior to the signing of the October 2009 agreement, and he argued strongly that he was misled into believing he was to be an employee only to find when given the agreement to sign that he was not to be engaged in that capacity.

[15] Save for a broad reference to the existence of the obligation of good faith in s 4 of the Employment Relations Act, there was no supporting legal argument as to the basis on which the Authority could or should find that the misleading conduct (if it occurred) meant the parties' relationship was one of employer and employee for the purposes of the personal grievance. Further, neither party referred to relevant provisions in any contract legislation which the Authority has jurisdiction to consider.

[16] For my part I have considered the content of the parties' approaches during the investigation. In an attempt to balance the absence of the essential legal argument from Mr Pollett with fairness to the respondent, I identify the following issues in respect of the Authority's ability to look behind the agreements to find there was an employment relationship:

- (a) whether, prior to entry into the October 2009 agreement in particular, the parties were in an employment relationship as defined in s 4 of the Employment Relations Act; and
- (b) if so, whether BREL engaged in misleading conduct in breach of s 4; and
- (c) if, so, what is the remedy.

## Background

[17] Mr Pollett has a background in tourism marketing and consulting. In August 2009 he met with BREL's directors and the company's general manager, Peter Newbold, to discuss the possibility of working as a real estate agent at BREL's Auckland office. His focus would be on developing real estate listings and sales in the mid-upper end of the New Zealand tourism market, mainly in luxury accommodation.

[18] Numerous emailed exchanges followed. None of the early exchanges referred at all to whether the position would be an employed or contracted position. Some additional face to face meetings also took place. There was heavy emphasis in these discussions on what type of real estate would be sold, to whom and how – in other words on marketing and business development. I accept that the discussions also covered matters such as commission structure, Mr Pollett's training (which included his attendance at the necessary real estate salesperson's course), office arrangements, territory and reporting structures. However discussions of that kind would be embarked upon whether the salesperson was to be an employee or a contractor, so I do not consider the discussions indicative of any common approach to the effect that the relationship was to be one of employment.

[19] As the discussions continued they turned to the need to place BREL's proposals in writing. By email message dated 24 September Mr Newbold sent what was described as a draft heads of agreement document for Mr Pollett's consideration. The document referred to the parties' discussions and said the outcome of the discussions was that: *Neil Pollett would work for [BREL] on the completion of his real estate license ticket.* Under a section headed 'The agreement is as follows' it summarised commission arrangements, the sector in which Mr Pollett would work, and the territory he would cover. The next section was headed 'other points raised and confirmed.' The listed points were primarily concerned with office arrangements, and mentioned the inclusion of tourism in the company's website as well as training for Mr Pollett. Finally there was a heading 'action points' under which was the sentence: *Prior to starting with [BREL] we would present an employment agreement for signing by Neil Pollett.*

[20] Further discussions followed, many by email. For example Mr Pollett had a query about the meaning of an item which appeared in the list of agreed points and read: *Neil Pollett will operate within the same rules as all other [BREL] sales agents.* The response was: *All are on the same basic employment contract.* Mr Pollett went on to ask for: *the revised version of the employment offer subject to what we discussed,* and later repeated the request asking that he be forwarded: *the final revised copy of the proposed contract.* Mr Newbold replied that he would: *amend the contract over the next few days to reflect.*

[21] Some of the subject lines in the messages of both Mr Pollett and Mr Newbold at about this time used the work 'employment' while others used the word 'contract' when nothing in the text of the messages suggested either party was attributing any special meaning to either word. Instead their focus was on finalising other arrangements of the kind set out in the heads of agreement.

[22] The October 2009 agreement was forwarded to Mr Pollett by message dated 30 October.

[23] As he told Mr Newbold he would, Mr Pollett sought legal advice on the agreement. He said in evidence that the significance of the 'independent contractor' provisions was raised with him, and he and his lawyer discussed the matter. He gave further evidence about the content of the discussion which is not material except to the extent that it allows me to find Mr Pollett received express advice on the inclusion of the provision identifying his status as that of independent contractor.

[24] Having received advice Mr Pollett did not attempt to negotiate about that provision, although there were further detailed discussions about other aspects of the parties' arrangements. Mr Pollett signed the October 2009 agreement in November, after minor amendments were made.

[25] Mr Pollett completed his real estate salesperson's course, and was to commence work 'in the near future'. Subsequently he began work as a real estate agent in the specialist niche the parties had agreed. The parties' relationship ended several months later, in the circumstances leading to the claim of personal grievance.

**Whether there was an employment relationship before November 2009**

[26] This section addresses events prior to entry into the October 2009 agreement, in order to ascertain whether the Authority has jurisdiction to consider Mr Pollett's concerns regarding misleading conduct.

[27] The Employment Relations Authority has jurisdiction in respect of employment relationships of the kind identified in s 4 (2) of the Employment Relations Act.<sup>1</sup> The relationships include: *(a) an employer and an employee employed by the employer.* This is a reference to an employment relationship which has commenced, except to the extent that the definition of 'employee' includes a 'person intending to work'.<sup>2</sup> A 'person intending to work' is: *a person who has been offered, and accepted, work as an employee.*<sup>3</sup>

[28] Because of the way Mr Pollett has expressed his concern I consider the relevant question to be whether, prior to November 2009, Mr Pollett was a person intending to work.

[29] There was some discussion during the investigation meeting about whether 'work' had already commenced. That was the case in the sense that, in September and October in particular Mr Pollett visited BREL's Auckland office with probably increasing frequency, spent longer periods of time there, and began to wind down his other business activities. He also undertook a real estate salesperson's course, although that activity was an agreed prerequisite to his taking up a position as a real estate salesperson and was not itself undertaken as part of an existing employment obligation.

[30] I accept that Mr Pollett undertook the activity as part of his commitment to the opportunity that had arisen with BREL, and that he felt encouraged by the fact that a heads of agreement had been prepared and discussions were continuing. However I do not accept the activity was more than preparatory to the commencement of a legal relationship. I do not accept that the activity was carried out pursuant to any existing agreement to the effect that an employment relationship had commenced, or pursuant

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<sup>1</sup> Section 5

<sup>2</sup> Section 6(1)(b)(ii)

<sup>3</sup> Section 5

to any requirement on the part of his employer, or in return for any remuneration. Many activities were at Mr Pollett's own initiative. Moreover there was agreement that the parties' relationship would commence after Mr Pollett had completed the real estate salesperson's course. Mr Pollett completed the course in early November.

[31] However none of this means that 'work' had commenced in the sense that a legal relationship had commenced. Essential elements of mutuality and consideration were missing in respect of that period.

[32] There was an additional suggestion that the heads of agreement amounted itself to an employment agreement, or at least a document incorporating key terms of an employment agreement, with a backdated commencement date of August 2009.

[33] I find the meeting in August 2009 amounted to no more than the commencement of discussions. The heads of agreement amounted to a way-point in the discussions – as illustrated by the opening paragraph which said the document detailed the discussions about Mr Pollett's working for BREL, before the document summarised points of agreement, identified some tasks still to be done and left open the door for the further discussion which went ahead. The document was never presented as the proposed final agreement, rather it was indicative of what the final agreement might contain.

[34] At the very end of the heads of agreement there was provision for the parties to sign an 'acceptance of heads of agreement' - which neither party completed - then the date '12 August 2009' appeared without more. I do not accept there is sufficient to construe the date alone as amounting to a provision for backdating to the August discussions the commencement of an employment (or any) relationship, as Mr Pollett sought to argue. Nor would I construe these circumstances as amounting to any backdated offer and acceptance of work at all.

[35] I might nevertheless accept that there is enough in the background circumstances together with the 'heads of agreement' to support a proposition that at or about the time the document was produced work had at least been offered and accepted in the sense that the parties had agreed to enter into a legal relationship. This is particularly so because the document expresses the 'outcome of the meetings' to

date as an arrangement that 'Neil Pollett would work for [BREL] on the completion of his real estate licence ticket'.

[36] The next question is whether the legal relationship in question concerned an offer and acceptance of work 'as an employee'.

[37] The answer to that question concerns essentially the same facts as those raised in support of Mr Pollett's argument that he was misled into believing he was to be offered an employment agreement. In that regard Mr Pollett relied substantially on the use of the words 'employer' or 'employment' in the heads of agreement as well as in emailed messages of the kind described earlier in this determination.

[38] Although the words 'employer' and 'employment' were used from time to time in the parties' exchanges, so was the word 'contract'. Both parties used the terms interchangeably. The difficulty is that words such as 'employer', 'employee' and 'employment' have a legal meaning under the Employment Relations Act, yet the word 'employ' also bears the ordinary meaning of 'to use the services of in return for payment.' The ordinary meaning is not necessarily limited to the meaning under the Employment Relations Act. It is capable of encompassing a relationship of principal and contractor.

[39] There is an unfortunate potential for confusion when the words 'employer' or 'employment' are used loosely, and I note that even s 51A(1)(b) of the Real Estate Agents Act 1976 and s 51(2) of the Real Estate Agents Act 2008 use the word 'employer' when, because of this potential for confusion, a word such as 'principal' would have been preferable.

[40] Otherwise there was no discussion between the parties regarding the nature of their relationship, and nothing in the wider discussions to suggest the parties both believed they were addressing an employment relationship. The discussions were also consistent with arrangements for entering into a contractual relationship, and Mr Pollett's preparatory activities were also consistent with those of someone who was committed to establishing a foundation for the success of a business relationship.

[41] Moreover there was no allegation that Mr Newbold made any written or oral representation regarding the nature of the relationship beyond using the word 'employer' or 'employment' as he did in the heads of agreement and in the examples. I find Mr Newbold's point of view was that Mr Pollett was being offered an engagement on the same terms as those applying to other real estate salespeople, namely as an independent contractor. When he noted in the heads of agreement that an 'employment agreement' would be presented for signing his terminology was unfortunate, but he was using the word 'employment' in its wider sense and was doing no more than recording that a written agreement would be made available

[42] In those circumstances and without more I do not consider the use of the word 'employer' or 'employment' in the discussions prior to signing the October 2009 agreement amount to or evidence an offer and acceptance of work 'as an employee' in the sense the word is used in the Employment Relations Act.

[43] For these reasons I conclude there was no employment relationship as defined in s 4(2) of the Employment Relations Act, and the Employment Relations Authority cannot take the allegations of misleading conduct any further.

### **Conclusion**

[44] The October 2009 and March 2010 agreements are conclusive as to Mr Pollett's status.

[45] I find Mr Pollett was an independent contractor and was not an employee. The Employment Relations Authority can take his dispute with BREL no further.

### **Costs**

[46] Costs are reserved.

[47] The parties are invited to agree on the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file in the Authority and copy to the other party a written statement of

what is sought and why. The other party shall have a further 14 days in which to file and copy to the first party a written reply.

R A Monaghan

Member of the Employment Relations Authority