New Zealand Employment Relations Authority Decisions

Price v Ninox Investments Limited (Wellington) [2018] NZERA 2071; [2018] NZERA Wellington 71 (16 August 2018)

Last Updated: 14 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 71
3020991

BETWEEN TYLER-JADE PRICE Applicant

AND NINOX INVESTMENTS LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Greg Lloyd, Counsel for Applicant

Charles McGuinness, Counsel for Respondent

Investigation Meeting: 20 March 2018 at Wellington

Submissions Received: 27 March and 5 April 2018 from Applicant

27 March and 5 April 2018 from Respondent

Determination: 16 August 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Tyler-Jade Price, claims she was unjustifiably dismissed by the respondent, Ninox Investments Limited (Ninox). Ms Price also seeks the payments of what she claims to be outstanding wages.

[2] Ninox denies it employed Ms Price. It says it engaged her as an independent contractor who subsequently abandoned the arrangement. It follows Ninox denies any wages owe.

Background

[3] Ninox trades as Ninox Construction. It is owned and directed by Melissa Warman. She is the partner of Ms Prices' father, Craig Foster, who is also Ninox's contracts manager.

[4] Ms Price says that in October 2015 Mr Foster asked her if she wanted to work for the business again, which reflects the fact she worked as a labour only contractor for five or so months in 2013. Ninox says it was Ms Price who approached Mr Foster.

[5] Mr Price says she was then employed as Ninox's administration accounts manager. She says her duties included processing wages and contractor payments; acting as a personal assistant to her father and Ms Warman; processing invoices and ordering, collecting and delivering stock.

[6] Ninox disputes that. It says Ms Price was assigned ad-hoc tasks on a job by job basis. It says that had she not been engaged

as a result of the family connection no one would have been.

[7] With respect to the dismissal Ms Price claims she received a text from Mr Foster on Friday 7 October 2016 advising she not attend work that day. She says a further text told her not to come in the following week but no explanation was offered.

[8] Ms Price says Ninox then told her mother she had stolen money by inflating the number of hours she claimed she had worked. These are allegations Ms Price strongly denies. Ms Price says she was no longer paid which must be considered to constitute a dismissal. Furthermore Ms Price says Ninox withheld approximately

$1800 it is alleged to owe for completed work and which she says is about $1000 greater than the sum Ninox claims she inappropriately claimed.

[9] Ms Price says the Police have also been involved but have indicated they are unlikely to act. It is Ms Prices' view the referral to the Police was an attempt by Ninox to coerce her into dropping her personal grievance claims.

[10] Aside from the argument Ms Price was engaged as a contractor, Ninox says it noticed anomalies in documents prepared by Ms Price and which related to payments

she received. A meeting was arranged with Ms Price's mother in attendance. It occurred on 17 October. Ninox's concerns were aired and according to it Ms Price gave various inconsistent responses before abruptly leaving.

[11] Ninox says that following her departure there was no contact with Ms Price until it received advice of the personal grievance on 17 November. Ninox accepts the Police are involved but denies this was an attempt to coerce Ms Price, instead stating that process will continue regardless.

[12] Ninox denies the allegation it has withheld money due to Ms Price.

Determination

[13] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[14] There are, potentially, two issues to be determined. That said it was agreed this determination address only the first of those which is the whether or not Ms Price was an employee as she claims or a contractor as Ninox asserts. If she was a contractor the Authority lacks jurisdiction to consider her claims further. If an employee the second issue of whether or not she was unjustifiably dismissed must be considered via a further investigation.

[15] Section 6 of the Employment Relations Act 2000 provides the meaning of employee. The material provisions state:

*(1) In this Act, unless the context otherwise requires, **employee** —*

(a) means any person of any age employed by an employer to do work

for hire or reward under a contract of service; ...

(2) In deciding for the purposes of subsection (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.

(3) For the purposes of subsection (2), the court or the Authority —

(a) must consider all relevant matters, including any matters that indicate the intention of a person; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[16] In *Bryson v Three Foot Six Limited (No.2)*1 the Supreme Court stated, amongst other things, what *all relevant matters2* means. It said:

"All relevant matters" certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly require the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) which were important determinants of the relationship at common law...

[17] In other words I am required to consider the following in order to determine the nature of the relationship:

a. The intention of the parties;

b. Was there anything in writing to indicate the terms of the relationship between the parties;

c. How the relationship operated in practice;

d. Features of integration and control in the relationship; and

e. Whether Ms Price was effectively working on her own account.

[18] Ninox is adamant Ms Price was engaged as a contractor and it intended that be so. Its witnesses remained true to that position when giving oral evidence and being cross examined about the arrangement and its formation.

[19] The same could not be said of Ms Price. While she now asserts she was employed her evidence, and the way it was presented, suggest otherwise. For example she accepts she was a contractor during her first engagement3 before going on to observe her father *... asked me if I wanted to work for the business again ...* and gave

her a document which identified her tax code as WT which she acknowledges she

1 [2005] NZSC 34; [2005] ERNZ 372

2 Section 6(3)(a) of the Employment Relation Act 2000

knew meant withholding tax. She says she was also told she would be responsible for her own ACC levies but observes that she did not really understand the implications and upon asking was simply told it was easier for the company.

[20] Ms Price does not allege she was expressly told she was to be engaged as an employee and that did not occur when giving oral evidence. Instead she went on to say *They told me that if I stayed long enough I would become part of the "wages team". In other words I would become an employee and not a contractor.*4 That strongly suggest she was not an employee upon commencement.

[21] She then states:

The respondent's statement in reply says at paragraph 2.3 that it was my decision to be an independent contractor. That is not true. It was the only choice I had...5

[22] The only conclusion I can reach given Ms Prices own statements (and notwithstanding the fact Ninox disagree some were made such as the promise of a later move to employment) is she not only knew she was being engaged as a contractor, she agreed. It may be she did so reluctantly but I must also observe there is no suggestion she aired such views at the time.

[23] I also note her answers, when giving oral evidence, did nothing to suggest the above conclusion is flawed. Indeed her evidence suggests she was familiar with both approaches to engagement including evidence one of her tasks has been to explain contracting to some of those so employed. Finally I note one further answer Ms Price gave. She was asked, given the content of paragraph 6 of her brief, whether or not she ever asked about becoming an employee and transferring to wages. Her answer was *often* to which the answer was inevitably that Ninox would consider it when the company could trust her and her reliability.

[24] With respect to written indicators I note there is neither an employment agreement nor a contract for services other but the evidence about Ninox's practices indicates this, in itself, suggests she was considered a contractor. The evidence is Ninox does have and use employment agreements while the arrangements with

contractors are essentially oral as occurred in respect to Ms Price.

4 Brief of evidence at [6]

[25] There are also a number of other documents which strongly point toward Ms Price being a contractor. On 29 October she signed a document entitled *All Contractors Complete* which states she would be subject to withholding tax as opposed to the PAYE regime an employee would be taxed under. The same day she signed a tax code declaration which similarly states she would be subject to withholding tax which, according to the Inland Revenue Department website, applies

to contractors.6 Finally I note Ms Price completed and furnished invoices upon which

she was paid.

[26] The points above strongly clearly lead to a conclusion Ms Price was engaged as a contractor; she knew it and agreed though that is not necessarily the end of the matter. It may be something in the way the parties actually behaved or issues of integration and control undermines the conclusion and means the arrangement was, notwithstanding the agreement, that of employer and employee.

[27] Notwithstanding Ms Price's attempts to convince me otherwise, the answer is

no.

[28] Ms Price's leave arrangements were those of a contractor with no sick, annual or public holidays and again the evidence is she accepted this and did not challenge it. Ms Price's attempt to convince me her tools of trade were provided by the employer also fell short when it became clear she was actually reimbursing the company for the telephone it has provided to allow her to commence.

[29] Ms Price also puts some emphasis on her having held the title of administration accounts manager. It is implied that is not the type of role traditionally filled by labour only contractors in this industry. On this I prefer Ninox's evidence the title was self-bestowed and while there were business cards stating this they had been arranged by Ms Price and management was not aware of it until after the event. Again this appears to have been confirmed by an answer Ms Price gave when cross-examined and it was only then Ninox chose to simply leave it which is in keeping with a looseness that was clearly present in the relationship due to the familial issues.

[30] There is then Ms Warman's evidence Ms Price was assigned ad-hoc tasks on a job by job basis and there was little consistency of conformity in them and their

performance. There is also evidence that while Ms Price might be offered some tasks

6 Section RD8(1)(b)(i) and Schedule 4 of the Income Tax Act 2007

she was not compelled to accept them and even when there had been an expectation she would do something but had not there were few if any consequences and answers provided by Ms Price tend to confirm this. Again this is not the way an employee would normally be treated. Similarly there was no challenge to the assertion that had Ms Price not been doing these tasks no one would have been employed to do so. They would have been performed by existing resources.

[31] Finally and while there is n text in which Mr Foster advised a specific start time its content also suggest it was sent in exasperation at his daughters attitude. Overall, and despite Ms Price's assertion her hours were regular, I must conclude the records which underpinned her invoices strongly suggest otherwise. The evidence also suggests once a task was allocated to Ms Price there was little control or oversight over how it was performed.

Conclusion and costs

[32] I have to conclude this arrangement was the result of familial ties and an attempt to assist Ms Price which appears to have been unsuccessful and led to an unfortunate rift. As a result the arrangement was somewhat loose and it is that which leads me to rely on the initial arrangement and supporting documentation which confirms Ms Price was engaged as a contractor. There was no agreement that change, nor was there anything in the way the arrangement operated that subsequently altered that.

[33] It follows the Authority does not have jurisdiction to consider Ms Price's

claims and they are dismissed. [34] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority
