

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 133
5324006

BETWEEN COURTNEY SANDERS
Applicant

AND PULP MEDIA LIMITED (In
Liquidation)
Respondent

Member of Authority: K J Anderson

Representatives: Courtney Sanders In Person
No Appearance for Respondent

Investigation Meeting: 10 March 2011 at Auckland

Determination: 5 April 2011

DETERMINATION OF THE AUTHORITY

Determination of a preliminary issue

[1] On 5th July 2010, the applicant, Ms Sanders, began working for Pulp Media Limited (PML) in the role of the Editor for *Pulp Magazine* (the magazine). The publisher of the magazine and sole director of PML is Mr Kevin Schluter. On 13th September 2010, Ms Sanders was informed by Mr Schluter that, for financial reasons, the first issue of the magazine that Ms Sanders had been responsible for, would not be going to print and as of that day, she would cease to work for PML. The company was subsequently placed into liquidation.

[2] Ms Sanders sought legal advice and via a letter dated 16th September 2010, a personal grievance was raised with PML on the basis that she was unjustifiably dismissed. There is no evidence of any reply to this letter. But there is evidence of an exchange of emails between Ms Sander's lawyer (Ms Anna Irving) and the Insolvency Practitioner responsible for the liquidation of PML, Mr Peter Drennan. It appears that it is not accepted that Ms Sanders was in an employment relationship

with PML, hence any potential or contingent liability arising from a personal grievance claim is not accepted as a preferential debt, rather it was suggested that Ms Sanders could join the list of unsecured creditors.

[3] Ms Sanders says that she was in an employment relationship with PML and wishes to pursue her claim of unjustified dismissal with the liquidator, albeit it is uncertain whether there are adequate funds to meet any liability that might arise. A *Statement of Problem* was received by the Authority on 27th October 2010. The problem that Ms Sanders requires the Authority to resolve is: whether or not she was an employee or an independent contractor. The liquidator has given consent for Ms Sanders to pursue proceedings with the Employment Relations Authority.

Was Ms Sanders an employee or an independent contractor?

The Evidence

[4] Prior to taking up the role of Editor of the magazine, Ms Sanders was living in Wellington. Around sometime in late May 2010, she travelled to Auckland, where the magazine was published, and had two interviews for the position. Ms Sanders subsequently accepted a verbal offer from Mr Schluter for the position of Editor. Upon her return to Wellington, there was an exchange of emails between Ms Sanders and Mr Schluter relating to the terms of engagement. In an email dated 3rd June 2010, Ms Sanders proposed a “Rate of Pay” of \$52,500. She also raised matters relating to editorial control and advertising. And then in regard to job security, Ms Sanders conveyed that:

I just want to make sure that the role of editor is secure for at least (and hopefully way longer!!) the first six months. Again it is a HUGE decision that I am making (one that is also very exciting!!) but I need to know that moving to Auckland and throwing myself into such an intensive role is a secure decision, at least in the mid term.

It also appears that there must have been some discussion about Ms Sanders investing in PML as she wrote that if she decided that PML was viable in the future, she would be prepared to invest “between \$25,000 and \$50,000” which would ensure a 10% to 20% shareholding in the company.

[5] On 4th June 2010, Mr Schluter replied by return email. There is a cryptic reference to a “First six month contract.” In regard to the rate of pay, Mr Schluter informed:

For the editors [sic] role, I am prepared to pay \$13,000 per issue or \$26,000 for the first six months. Please find the job description attached.

Mr Schluter confirmed that Ms Sanders would have “complete editorial autonomy – major control over the written and fashion content.”

[6] The evidence of Ms Sanders is that there was never any discussion about whether she would be an employee or a contractor, but I have some doubts that this is so as she confirms that an agreement was emailed to her “three or four weeks” before she commenced her role with the magazine. The copy of the agreement available to the Authority is unsigned. Ms Sanders told the Authority that she did sign “something” and that it could have been this agreement, or perhaps it may have been “a non-disclosure agreement.”

The written agreement

[7] It is headed *Independent Contractor Agreement* and: *This agreement is made on the 9 June 2010. The parties to the agreement are:*

Pulp Media Limited (“The Customer”)

AND

Courtney Sanders (“The Contractor”)

Further relevant content of the agreement is:

1. Status Of Contractor

1.1 *The Contractor is at all times a self-employed contractor to The Customer and is not an employee of The Customer.*

2. Performance Of Duties

2.1 *The Contractor shall perform all services and obligations as specified in ‘Appendix A – Services’ and any other duties in addition as agreed between the parties during the period of this Agreement.*

3. Term Of Agreement

3.1 *The date of commencement of Services shall be 5 July 2010. The Contractor is engaged under this Agreement to provide the Services described on a 6 month basis until 5 January 2011 or until the completion of the services, whichever is first.*

3.2 *There shall be no obligation on either party to renew this Agreement at the expiry of its term, however by mutual agreement the terms of this agreement maybe renewed or rolled over on an issue-by-issue basis.*

3.3 *Either party may terminate this Agreement on 28 days written notice if there has been a failure to fulfil the Services (See ‘Appendix A – Services’1) or a material breach of this agreement by the other party.*

4. Duties And Obligations

4.1 *Unless specifically authorised in writing, The Contractor will not commit The Customer to any obligation, nor shall it contract on behalf of The Customer. The Contractor has no authority to pledge credit, make representations or incur liability on behalf of The Customer.*

5. Payments And Payment Terms

5.1 *The Contractor shall, during the term of this Agreement, invoice The Customer promptly within three days of the end of the month for Services rendered during that month. See 'Appendix B – Payment'² for reimbursements.*

5.2 *Subject to clause 5.1 and provision of the Services to the satisfaction of The Customer, The Customer shall pay for Services rendered by direct credit to The Contractor's bank account on a fortnightly basis.*

[8] Following are conditions relating to confidentiality and ownership of property as well as special conditions pertaining to a restraint of trade. On the face of it, Ms Sanders was prevented from working for several named companies during the duration of the agreement and within three months of its expiry date.

¹ Set out at Appendix A is a list of "Services" that Ms Sanders was expected to provide relating to editorial matters and general administration.

² Set out at Appendix B is some detail pertaining to the total payments to be made to Ms Sanders over six months, on the basis of fortnightly net payments of \$1,500. (\$26,000 less withholding tax of \$6,500).

The evidence of Ms Sanders

[9] Ms Sanders says that in regard to the above agreement, while she was paid \$1,500 each fortnight into her bank account, she did not ever provide an invoice; nor was she asked to do so.¹ Ms Sanders also says that at all times she worked from the PML offices and was expected to be there by 9:00a.m. until 5:00p.m. each day, albeit she worked longer hours than this. Ms Sanders did not provide any materials or equipment and every thing necessary to carry out her role was provided by PML. She says that when she was introduced to people by Mr Schluter, it was if she was an employee working for him. Unfortunately, due to the short time that Ms Sanders was in the role (approximately 6 weeks) there is little further evidence that assists the Authority to assess the overall nature of the relationship.

¹ The Inland Revenue records provided by Ms Sanders show that withholding tax was deducted for the months of July and August 2010.

The legal framework

[10] Any analysis of the factors that the Authority must consider in determining this question begins at section 6 of the Employment Relations Act 2000 (the Act). It provides”

6. Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee-**
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes-
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who-
 - (i) does not expect to be rewarded for work to performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer.
- (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 the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[11] While applying s6, particularly the consideration of all relevant matters, in determining whether or not there was an employment relationship between Ms Sanders and PML, the Authority must also be cognisant of the traditional tests adopted by the Supreme Court in *Bryson v Three Foot Six Ltd*,² namely the intention, control, integration and the fundamental tests and the use of those tests (where applicable) to establish the real nature of the relationship. But of course each case must be determined on its own particular facts without unquestioning adherence to any particular formula.

The intention of the parties

[12] The first relevant matter that falls for analysis is the written agreement that was provided by Mr Schluter to Ms Sanders. On the basis of the evidence available, I conclude that it was most probably the intention of Mr Schluter that Ms Sanders

² [2005] ERNZ 372.

would be an independent contractor. This is evident from the heading and general content of the agreement that was provided. However, the evidence about whether or not Ms Sanders signed the agreement is inconclusive. If Ms Sanders did sign the agreement then, obviously, that would also indicate an intention on her behalf to be an independent contractor, particularly if one takes into account the evidence relating to the possibility that she might invest funds into PML, albeit an employee could also, possibly, invest in the employing business. On the limited evidence that is available to the Authority, it is possible, but certainly not conclusive, that the intention of the parties was that Ms Sanders would be an independent contractor. However, the Authority is not to treat as a determining matter any statement (including contractual statements), that describes the nature of the relationship.³

Control and integration

[13] The evidence of Ms Sanders is that at all times she was expected to and did, work from the PML offices every working day. While it seems that she had considerable autonomy in regard to editorial and other matters pertaining to the publication of the magazine, Ms Sanders was accountable to Mr Schluter and was largely integrated into the business. She did not have the freedom to pursue other business interests – and there is no evidence that she had any desire to do so. Additionally, Ms Sanders was bound by a purported restraint of trade: “*for the duration of this contract and within three months of its end date.*” Applying the generally recognised principles relating to the control and integration test, I conclude that the overall circumstances point more to Ms Sanders being an employee than an independent contractor.

The fundamental test

[14] Put simply, the fundamental test examines whether a person providing services is doing so on their own account. A more accurate term is probably the “economic reality” test as the focus of the enquiry is on any business transactions and records that are available. Regrettably, the evidence here is sparse. Nonetheless, while according to the aforementioned agreement (Appendix B), Ms Sanders was expected to invoice PML on a monthly basis,⁴ her evidence is that she did not do so and she was not asked to, albeit the relationship only lasted approximately six weeks. The Inland Revenue

³ Section 6(3)(b) Employment Relations Act 2000. See also *Bryson* (ibid).

⁴ Notwithstanding that the status of the agreement remains inconclusive.

records show that withholding tax was paid but this could be interpreted to point either way in regard to whether Ms Sanders was an employee or a contractor.

[15] Apart from not invoicing PML for her services, there is no evidence available to the Authority to suggest that Ms Sanders was providing services on her own account. The evidence of Ms Sanders is that everything required to carry out her role was provided by PML. Apart from receiving \$1,500 into her bank account each fortnight, there is no evidence that Ms Sanders received any other income and she was not able to increase her income by extending her skills into other business avenues. On the evidence available I conclude that Ms Sanders was not in business on her own account.

Determination

[16] Because there is largely only the evidence of Ms Sanders available to the Authority I have taken a cautious approach to determining this matter. But on the limited evidence available and by applying the provisions of section 6 of the Employment Relations Act 2000 and the accepted tests confirmed by *Bryson* and subsequent cases, and upon the consideration of all relevant matters, I find that it is more probable than not that the true nature of the relationship between Ms Sanders and PML is that Ms Sanders was an employee and not an independent contractor. That is the only matter before the Authority for determination and if Ms Sanders wishes to pursue a personal grievance regarding the circumstances of her departure from PML she will need to make a new application to the Authority accordingly.

Costs: Ms Sanders represented herself before the Authority but she has incurred an application fee to proceed with this matter in the Authority. Pulp Media Limited is ordered to pay to Ms Sanders the sum of \$71.56.

K J Anderson
Member of the Employment Relations Authority