

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 159/07
5050320**

BETWEEN Dora Wang
 Applicant

AND Horton Media Ltd
 Respondent

Member of Authority: James Wilson

Representatives: Dora Wang in person
 Stephen Langton for the respondent

Investigation Meeting: 4 April 2007 in Auckland

Determination: 25 May 2007

DETERMINATION OF THE AUTHORITY

The issue for Determination

[1] Dora Wang says that she is owed commissions by the respondent, Horton Media Limited. Horton Media (Horton's) dispute Ms Wang's claim and say that, in any event, Ms Wang was not an employee and the Authority have no jurisdiction to investigate her claim. Horton's were at first, in the light of their stated position, reluctant to co-operate with the Authority's investigation. However in a minute to the parties dated 14 March 2007 I advised that it was my intention to convene an investigation meeting, on 4 April 2007, to consider whether or not Ms Wang was an employee. I also advised that if I were to determine that Ms Wang was an employee I would establish a timetable for investigation of her substantive claim.

[2] The sole issue for decision in this determination is whether or not Ms Wang was an employee of Horton Media Limited. If the answer to this question is yes she is entitled to pursue her claim in the Authority. If she was not the Authority has no jurisdiction in this matter.

Background

[3] There is no dispute between the parties that Ms Wang was, for some years, employed by Horton's. She resigned from her employment in October 2004. Although she indicated to Horton's that it was her intention to "retire" she, immediately following her resignation from Horton's, went to work for a competitor company. Although not directly relevant to the question of whether or not she was subsequently re-employed by Horton's, Horton' assert that when she resigned she removed confidential information which she subsequently used while working for the new company. Shortly after its establishment the new company failed and ceased operating. At that point Horton's purchased a printing press from the failed company which also returned the confidential information removed by Ms Wang.

[4] Following the failure of the new company Ms Wang asked to be re-employed by Horton's. Given the circumstances surrounding her resignation Horton's say they were reluctant to reemploy Ms Wang. However, according to Horton's, after some discussion they agreed to retain Ms Wang (or her company) as an independent contractor tasked with finding new print media clients for it only.

[5] In January 2005 Ms Wang formed a company, Dora Media Ltd. Later that month Dora Media entered into a contract with Horton's. The conditions of this contract were set out in a letter dated 26 January 2005 and signed by Matthew Horton, Chief Executive of Horton Media Limited and Dora Wang as "Director-Dora Media Limited". This letter stated:

The purpose of this letter is to outline an arrangement by which we would be prepared to work with you as a preferred sales broker to Horton Media.

The letter then went on to outline a number of conditions under which Dora Media Limited would represent Horton Media Limited. It included:

- Dora media agreed not to present potential clients with any other printers' quotes for the same job without Horton media's express approval.
- Dora Media was not to approach or deal with any existing Horton Media clients without Horton's express approval.
- Horton media was to handle all client billing and production communications.
- The scale of commission payable.
- Termination arrangements.

[6] For reasons which are not relevant to whether or not Ms Wang was an employee, the arrangement between the parties was terminated in 2006. Ms Wang says that Horton's still owe her commissions for sales made in terms of the contract.

Legal considerations

[7] The Employment Relations Act (the Act), at Section 6 says that the Authority *in deciding whether a person is employed by another person under a contract of service ... must determine the real nature of the relationship.* The Act also says that the Authority

(a) must consider all relevant matters including any matters which indicate the intention of the persons; and

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

[8] Judge Shaw in the Employment Court, in *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ, 581, said:

Since s.6 of the Employment Relations Act 2000 changed the tests for determining what constitutes a contract of service there have been two cases which have interpreted the changes to the law. The principles established by these cases may be summarised as follows:

The Court must determine the real nature of the relationship.

Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.

The intention of the parties is still relevant but no longer decisive.

The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test.

The fundamental test examines whether a person performing the services is doing so on their own account.

Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

Discussion

[9] Applying any of the tests outlined in *Bryson* leads to the inevitable conclusion that Ms Wang was not an employee.

The intention of the parties: When she entered into the contract with Horton's in January 2005 both she and Mr Horton clearly intended that this would be a contract for services. Ms Wang went so far as to register a company (Dora Media) to deliver those services.

The control test: The only control exercised by Horton's over the operations of Ms Wang (or Dora Media) was that she act as agent, when selling printing services, exclusively for Horton's. Mr Langton, on behalf of Horton's says that Dora Media (and by implication Ms Wang) was free to undertake any other business she wished. Ms Wang in her verbal evidence told me that she spent only a relatively small part of her time selling print services for Horton's.

The integration test: Ms Wang's activities were in no way integrated with Horton's business, with the sole connection being that she, through her company, acted as a sales agent for Horton's.

The fundamental test: In answer to the question *was Ms Wang was in business for herself?* there is no doubt that she was. She established an independent company and it was the company, not Ms Wang personally which contacted to Horton's. She, through her company, could have contacted to undertake services for companies other than Horton's, albeit not as a broker of printing services.

Industry practice: Neither party has sort to convince me that there is any prevailing industry practice that would assist me in determining this matter.

Determination

[10] For the reasons set out above I determine that Ms Wang was not an employee of Horton Media Limited. She is unable to pursue her claim against Horton's through Employment Relations Authority

Costs

[11] In his final submissions Mr Langton has sort costs on behalf of his client in the order of \$750. In the absence of a submission in response from Ms Wang it is appropriate that I reserve the question of costs at this time. Should Horton's wish to pursue the question of costs they should in the first instance attempt to reach agreement with Ms Wang regarding an appropriate level of contribution to their costs. If the parties are unable to reach an agreement Mr Langton should, within 28 days of the date of this determination, reconfirm (by re-submission of his earlier submissions) his client's request for an order in respect of costs. Ms Wang will then be given 14 days in which to file a written response. Although not wishing to predetermine this matter I should point out that Ms Wang, while not impecunious would clearly find any award of costs a financial burden.

James Wilson

Member of the Employment Relations Authority