Determination Number: AA210/06
File Number: 5033128

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Robyn Ngaire Willis (Applicant)
AND	Fernridge Holdings Limited (Respondent)
REPRESENTATIVES	Daniel Erickson for Applicant Agnes McKay for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	7 June 2006
DATE OF DETERMINATION	22 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem the Authority has been asked to investigate and determine is presented as a claim to recover arrears of wages and a claim of unjustified dismissal. The applicant Mrs Robyn Willis has brought those claims against the respondent Fernridge Holdings Limited (FHL), contending that they arise from an employment relationship she had with that company.

[2] FHL has formally responded to the claims by denying that the relationship which did exist with Mrs Willis at material times was one of employment under a contract of service. FHL contends that the relationship was one of a contractor under a contract for services. In the event she is found to have been an employee, FHL has further responded by holding up against Mrs Willis the statutory requirement for personal grievances to be raised with the employer inside 90 days.

[3] Ms Willis has conceded that her unjustified dismissal grievance was not raised within that period after the termination of her contended employment, but she asks the Authority to find that "exceptional circumstances" were present and delayed her in doing so. Upon reaching that finding the Authority may permit a grievance to be raised late, and the grievance may then be disposed of by investigation and determination if necessary.

[4] The parties were not able to resolve their dispute in mediation undertaken by them. They have agreed that the Authority should determine as preliminary matters the nature of their relationship and the exceptional circumstances issue, before investigating further. A break in the investigation would seem to be needed under s.114(5) of the Employment Relations Act 2000, which requires mediation to follow the granting of leave to raise a grievance outside the 90 day period. (It is not entirely clear from those provisions whether they apply where, as in this case, mediation has already taken place voluntarily between the parties.)

[5] The Authority heard and examined the evidence of Mrs Willis, Mr Stewart Read the managing director of FHL, and Mr Marck de Lautour, a chartered accountant engaged by the company.

Nature of relationship

[6] There is no dispute between Mrs Willis and FHL that at the beginning of their work association they entered into a contract of service. The terms of it were set out in a letter dated 16 November 1998 addressed to Mrs Willis and signed by Mr Read. They included a "salary" of $25,000 per annum, payment of commission on sales, a "workplace" in Mrs Willis' home, reimbursement of certain expenses including motor vehicle use, and holidays of "three weeks per year plus statutorys."

[7] The parties do agree that in November 1998 they intended to have an employment relationship, and I find as a matter of law as well as fact that was the nature of their relationship then. Mrs Willis commenced working as Marketing Manager for FHL, a company manufacturing and distributing surgical drapes, gowns and similar products used in hospitals.

[8] FHL contends that in mid 1999 the relationship became one of employer-contractor. FHL says that this change resulted from new arrangements Mrs Willis asked to have implemented for the payment of her remuneration. There is no dispute that following an approach made by Mrs Willis and her accountant, Mr Graham Wrigley, to FHL's accountant Mr de Latour, she began invoicing FHL a monthly "retainer", commissions and other work expenses. GST was added to the amounts invoiced. In relation to the retainer, the amount invoiced each month was one twelfth of the previously agreed $25,000 salary figure, plus GST.

[9] Under the arrangements before invoicing was introduced FHL had been direct crediting the bank account of Mrs Willis a monthly amount of one twelfth of $25,000, less a sum retained by the company as PAYE. In a letter dated 20 July 2004 Mr Wrigley acknowledged that the invoicing arrangements meant that Mrs Willis became responsible for the payment of income tax and ACC levies.

[10] The invoicing arrangements were not initiated by FHL, and I find that Mr Read only became aware of them in early 2000, several months after they were implemented. He questioned Mr de Latour then about them but did not instruct that they were to be stopped. FHL therefore at least acquiesced in the invoicing arrangements, and in any event Mr de Latour had approved of the arrangements and, as FHL's agent, may be taken to have bound the employer to them.

[11] The question for the Authority is whether the introduction of the invoicing arrangements changed the nature of the work relationship. Mrs Willis argues that it did not. Mr Read said in evidence the arrangemets had made no practical difference to him; Mrs Willis carried on performing the same work as before in the same way, and she received the same level of remuneration.

[12] As has been submitted, applying the statutory test the Authority must enquire overall as to the real nature of the relationship. The intention of the parties and other factors may be taken into consideration but are not determinative by themselves.

[13] I find that the intention of the parties to maintain an employer-employee relationship did not change when the invoicing arrangements were introduced. Mrs Willis said that this had been a device to "facilitate'' the repayment by FHL to her of the substantial personal loan she had made to the company. I prefer Mr de Latour's evidence on this point however and I accept that the arrangement offered no particular advantage over other ways of supervising debt repayment. There were clearly advantages to Mrs Willis in receiving her remuneration without deduction of PAYE and with GST added, as I expect Mr Wrigley had advised her, and it seems more likely the objective had been to reap those benefits. What her motive was is not so important as what she and FHL had intended by the changes.

[14] The finding I make from the evidence is that for the purposes of receiving and having at her disposal a particular level of remuneration, Mrs Willis intended to be treated as a contractor, but in form only. She and FHL had no intention of altering the substance of their relationship, which continued unaffected by the change. The real nature of it remained the

same as it had been at the beginning. There remained substantial elements of control and direction exercised over Mrs Willis by Mr Read and there was also a substantial integration of her position into FHL's business. I do not regard her as being in business on her own account. An application of these traditional indicia supports the conclusion that the relationship did not change but remained one of employer-employee at all times.

[15] I apply the same reasoning as the Authority when faced with a similar change made to pay arrangements in *Gillespie v Data Group Ltd* AEA 224/03, 22 July 2003. There the Authority held that the introduction of tax invoices was "not a statement that the employment relationship was ended and a new intended contractual relationship was put in place."

[16] As she was an employee in my finding, it follows that Mrs Willis is able to have her wage arrears claim investigated and determined by the Authority. The amount in issue is substantial, being about $85,000 at the time the claim was lodged in March 2006.

Leave to raise personal grievance out of time

[17] Mrs Willis' grievance is a claim that she was constructively dismissed from her employment with FHL. She says this occurred at a meeting she had with Mr Read and Mr de Latour in October 2002.

[18] Mrs Willis acknowledges that a personal grievance was not formally raised by her until July 2004 when Mr Wrigley her accountant wrote to FHL. His letter referred to "a claim for constructive dismissal," and purported to raise that grievance about 18 months outside the 90 day period required by s.114 of the Act.

[19] Mrs Willis told the Authority that she had not become aware of the existence of the 90 day time limit until early 2003, when she consulted a solicitor. By then she was outside the time period and did not do anything until over a year later in mid 2004.

[20] As there is no issue that FHL has in any way consented to the late raising of the grievance, Mrs Willis must seek and obtain leave from the Authority to do that if she wishes to have the grievance resolved under the Act.

[21] As submitted, leave may only be granted if the Authority is satisfied that the delay was occasioned by "exceptional circumstances." In addition the Authority must consider it just to grant leave.

[22] The exceptional circumstances Mrs Willis claims existed are two of the particular types identified in s.115 of the Act. The first is that she was so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising it within the 90 day period. The second is that her individual employment agreement did not contain a plain language explanation of the services available for the resolution of personal grievances. Section 65 of the Act requires every individual employment agreement to include such explanation among the terms of employment, which are required to be put in writing.

[23] As well as any of the specific types provided by s.115, other situations that constitute "exceptional circumstances" may be found by the Authority to provide a basis for the grant of leave.

Affected or traumatised so as to be unable to properly consider raising a grievance

[24] While undoubtedly Mrs Willis was suffering from serious medical conditions which could partly be linked to what had been happening in her employment over a prolonged period, in my view it is unlikely these rendered her "unable to properly consider" raising a grievance. I find that she was able to at least consider taking some form of action, as she "consulted a solicitor" (not Mr Erickson). She said she had learned about the 90 day period from that solicitor. I do not accept that for months on end she was physically or mentally prevented from instructing a solicitor or other agent, or from writing a note herself to Mr Read, to

complain about her contended dismissal.

[25] An indication of her ability to think and act normally, is given by the fact that Mrs Willis was able to properly consider how she should protect the monies she had lent FHL and get them repaid. She drafted the comprehensive "agreement and acknowledgement of debt document," and she was able to apply herself successfully to the task of getting Mr Read to sign it. That was done on the day she claims to have been dismissed, 18 October 2002. I consider it unlikely that she suddenly deteriorated in health to a point where she could not properly consider the protection of her employment right to challenge her dismissal, once she became aware of the grievance remedy and the time limits attached to it. I find it likely that having done all she could to secure repayment of her loan monies she did not want to risk having Mr Read put FHL in liquidation or breach the terms of the "agreement and acknowledgement of debt" that had been carefully drawn up by Mrs Willis and signed by Mr Read. I find that she did not want to provoke Mr Read, as he was likely to be if he had received a constructive dismissal claim for thousands of dollars.

[26] Further, I find it unlikely that her various ailments were endured constantly throughout the 90 day period, so as to continuously prevent or hinder the raising of a grievance by her.

[27] Exceptional circumstances of the type identified at s.115(a) of the Act, I find were not present.

Plain language explanation of dispute resolution

[28] The employment agreement did not contain a provision of the type required by s.65 of the Act. When the agreement was entered into in 1998, it was not required by the Employment Contracts Act 1991 to have such a provision. Even the current statute does not require that, as s.65 in Part 6 of the 2000 Act does not apply to transitional employment agreements; see s.242(2) of the Act.

[29] It is a fact that the agreement did not have a provision informing Mrs Willis of her right to bring a grievance and of the need for her to do so within 90 days. It is a relevant circumstance that a source of crucial information was not made available to her. The absence of any statutory requirement for the employer to provide that information in the employment agreement is also relevant; many other transitional employment agreements would not have had a s.65 clause added (or have even been put in writing) after the 2000 Act came into force, and it therefore cannot be said in this regard that Mrs Willis' particular circumstances were out of the ordinary, or exceptional.

[30] Mrs Willis would seemingly have wanted to run with the hare and hunt with the hounds; she had wanted to give the appearance of being a contractor while also retaining what she now claims as beneficial provisions uniquely to be found in agreements made under the Act. There is an inconsistency in that approach, lowering the merits of her claim of exceptional circumstances under s.115(c) of the Act.

[31] I am therefore unable to find for any reason, even taking a global view of the situation, that exceptional circumstances were present and were causative of the long delay that occurred in raising the grievance.

Whether just to grant leave

[32] I consider that the length of the overall delay, about 18 months, was great enough that in justice leave should be declined. The equivocality Mrs Willis introduced into the nature of her relationship with FHL, at least in the appearance of that relationship, is also something that counts against her when looking at the justice of the matter.

Determination

[33] For the above reasons the determination of the Authority is;

- Mrs Willis was at all material times an employee of FHL employed under a contract of service.

- Mrs Willis is declined leave to raise a personal grievance with FHL.

[34] The wage arrears claim can therefore proceed and arrangements will be made by the Authority through Mr Erickson and Ms McKay for that to happen.

Costs

[35] Costs are reserved.

A Dumbleton
Member of Employment Relations Authority