

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 60
5636931

BETWEEN

KAY TRIGGS
Applicant

AND

JB PRESENTATIONS
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: David Beck, Counsel for the Applicant
Jeff Goldstein, Counsel for the Respondent

Investigation meeting: 2 March 2017

Submissions received: At the investigation meeting

Final evidence supplied: 7 April 2017

Determination: 27 April 2017

DETERMINATION OF THE AUTHORITY

Kay Triggs was not an employee when she worked for JB Presentations Limited in 2016. Her unjustified dismissal and disadvantage claims cannot proceed.

Employment relationship problem

[1] Ms Triggs claims that she was an employee, as a homemaker, when she worked for JB Presentations Limited (JB) from January to March 2016, and that JB unjustifiably dismissed and/or unjustifiably disadvantaged her.

[2] JB says she was never an employee but was an independent contractor. It terminated her contract with notice as provided for under the contract. Therefore, JB says that the Authority has no jurisdiction to consider the personal grievances claimed.



[3] This determination resolves the threshold issue of whether Ms Triggs was an employee.

The relevant law

[4] Ms Triggs bears the onus of establishing on the balance of probabilities that she was an employee.

[5] Section 6 of the Act defines an ‘employee’ as:

- (1)(a) ... any person of any age employed by an employer to do work for hire or reward under a contract of service, and
- (b) includes –
 - (i) a homemaker; ...
- (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...

[6] The law requires the Authority to determine the “real nature of the relationship” between the parties. That requires considering all relevant matters including any that indicate the parties’ intentions.

[7] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd*.¹

[8] The Employment Court in *Poulter v Antipodean Growers Limited*² summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

- 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.

[9] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental or economic reality test.

[10] In *Poulter*, the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

The history between the parties

[11] Ms Triggs was engaged in the same work, as a sales consultant, from 2007 until May 2015. Simon Jerard took over the business on 1 April 2015 with his company. Mr Jerard offered Ms Triggs work on the same conditions as she had been on previously. She accepted that offer.

[12] JB provides advertising for its clients by way of them purchasing advertising space on desk pads, calendars and flyers etc. Sales consultants sell advertising space and are responsible for obtaining and collating copy and artwork from the clients for JB to use in its products.

[13] Ms Triggs had been working under a contract that described her as a contractor. She was paid commission only and worked part-time, including some of the time from home.

[14] Ms Triggs resigned in June 2015 because her health had been poor and she was upset with Mr Jerard for removing the sale of a particular product from her.

³ Ibid at [21].

[15] On 9 December 2015, Mr Jerard emailed Ms Triggs. He was aware that she was looking for work. He wrote:

We will be advertising early new year for new consultant position.
 Was just thinking about you and your health situation. Have you ever thought about doing selling from home for JB's.
 I understand if you're angry with me and it's the last thing you want to do.
 But I know you're great at selling. Just putting it out there.

[16] On 17 December 2015, Ms Triggs and Mr Jerard met to discuss her possible return to work. The following day Ms Triggs asked Mr Jerard to be a referee for a job application she had made.

[17] On 1 January 2016, Ms Triggs emailed Mr Jerard to say that she was keen to resume selling for JB. On 13 January 2016, Mr Jerard replied agreeing that she could come:

... back on board – you never know where it may lead.
 To fit in with your health etc maybe just do one product at a time – maybe a contractors or a builders one you are familiar with.
 Is your computer ok. And do you think you might be able to pop into work on a Friday to tidy up any paperwork ...
 We will also pay for your phone etc.
 An incentive – I will give you \$500 – catch is - \$250 up front and the other \$250 when you finish - but the product you're working on has to be finished. How's that sound. ...
 Look forward to your feedback.

[18] Ms Triggs agreed, although she asked if she could use her old JB's computer. She went into JB's office and picked up the "job bag". On 15 January 2016, Mr Jerard signed a new contract and presented it to Ms Triggs. It was same as her earlier contract. The contract describes her as a contractor.

[19] Ms Triggs commenced work from home, using a laptop supplied by JB. In February 2016, JB terminated all the advertising sales contracts as it wished to engage employees instead, which it now does.

The intention of the parties

[20] On 15 December 2015, JB presented Ms Triggs with a document entitled "Advertising Sales Contract", which she signed on 19 January 2016.

[21] Clause 7 is specific and detailed:

The relationship between the parties is that of hirer and independent contractor and it is expressly acknowledged that the Contractor is not an employee of the Company.

Consistent with that relationship, the Contractor is responsible for the payment of all tax (including income tax) and levies (including Accident Compensation levies) applicable to the Contractor. Provided that it is agreed that, if required to do so by the Inland Revenue Department, the Company shall deduct resident withholding tax from payments made to the Contractor for services.

The Contractor shall not ... be entitled to paid holiday, sick leave or redundancy.

The Contractor is appointed as the agent of the Company for the sole purpose of securing advertising business for the Company in accordance with this agreement. It is agreed that the Contractor shall not be the agent of the Company for any other purpose.

[22] On the face of it, this signed contract shows that the parties intended that Ms Triggs was not to be an employee.

[23] However, s 6 (3)(ii) of the Act provides that any statement made by the parties describing the nature of their relationship is not determinative of the nature of the relationship. That remains to be determined by the Authority.

[24] Ms Triggs' counsel submits that there are a number of reasons the contractual description of Ms Triggs as a contractor is not determinative.

[25] First, Mr Beck says that I must undertake my analysis within the context of the objects of the Act. Section 3(a)(ii) provides that one of the objects is to acknowledge and address the inherent inequality of power in employment relationships.

[26] Mr Beck submits JB was in a greater position of power than Ms Triggs and the terms of engagement were imposed on her. The fact that Ms Triggs was aware in advance what the contract contained, because it was the same as the one she worked under in 2015, seems to me to somewhat reduce the power imbalance.

[27] I note also that Ms Triggs had been offered another role in which she would have been an employee, which she turned down to accept JB's offer. She did so for her own reasons related to her health including the flexibility of how she worked the minimum hours JB required of her (25 per week), and the advantage of not having to travel to and from her place of work every day.

[28] Although the contract sets out the services JB required of Ms Triggs, it also stated that JB could alter the services the contractor was to provide “provided the Company gives the Contractor three weeks’ written notice.” Mr Beck submits that is evidence of an employer/employee relationship.

[29] I agree that often an employer reserves the right to instruct an employee to undertake duties other than those specified in an employment agreement. However, there is nothing to prevent an employer reserving the right to alter the services a contractor is to provide. JB agrees to give the contractor three weeks’ notice if it does so. That is the same period of notice either party has to give to terminate the contract. That is in line with the arrangement being one of a contract for services, in that if the contractor does not like the altered services she is asked to provide she may give notice terminating the contract.

[30] JB paid Ms Triggs a “goodwill payment” of \$250 plus GST once she signed the contract. I consider Mr Jerard decided to make this offer because he wanted to secure Ms Triggs’ services, and he knew she was also looking elsewhere for work. A goodwill payment is not usual for an employee, but I consider it a neutral factor, which does not tend to suggest Ms Triggs was an employee or a contractor.

[31] Clause 3.5 of the contract required Ms Triggs to provide the services personally:

...but [she] may subcontract or assign the contract to another person, provided the Contractor proves the proposed Subcontractor or Assignee is respectable, responsible and capable of performing all the requirements of the agreement and provided the terms of assignment or subcontract are in a form approved and executed by the Company.

[32] Generally, a contractor is not required to perform the services personally. That is more likely a feature of an employment relationship. However, salespeople represent a business directly to its customers and so it is likely a principal/employer would wish to retain a level of control over who provides the sales. I consider the clause to be one that is more likely to indicate a contracting relationship.

[33] Apart from the description of Ms Triggs as a contractor, other features of the contract tend to indicate that the intention of the parties at the beginning of the relationship was that of employer/contractor. These are the requirements that Ms Triggs be:

- responsible for her own expenses incurred in performing the services;
- registered for GST once she reached the IRD earnings threshold;
- responsible for arranging her own insurance “to cover all risk associated with their work ... at (her) own expense”; and
- responsible for her own ACC levies and income tax, subject to JB deducting withholding tax.

[34] Although how the parties describe themselves is not determinative, the contract specifically spells out very clearly a number of ways the relationship was a contracting and not an employment relationship. It is weighty evidence that both parties intended their relationship to be one of contracting and not one of employer and employee.

Industry practice

[35] There is not one single industry practice in sales work. There is a mix of employed salespeople and salespeople who are independent contractors.

Integration test

[36] This requires me to consider whether Ms Triggs’ services were integral to JB’s business, and how she was integrated into the business.

[37] It is clear that Ms Triggs’ work of selling advertising was integral to the business. It is the central task of the business.

[38] While she was engaged, Ms Triggs appeared on the company’s website as a sales consultant. Her email address was a JB email address.

[39] Mr Jerard explained that it was necessary to be able to prove to customers that Ms Triggs, and all the salespeople, were authorised to be selling advertising space on behalf of JB and that is why they appeared on the website and had JB email addresses.

[40] I accept Mr Jerard’s explanation and consider that in this case the website presence and email address are factors that do not point one way or the other.

[41] Although an earlier owner of the business had supplied Ms Triggs with business cards, JB did not once Mr Jerard bought the business. I accept Ms Triggs’

evidence that she did not use any business cards from January to March 2016. The existence of business cards is not relevant to my decision.

[42] However, unusually for a contracting arrangement, JB gave Ms Triggs a laptop to work with, supplied her stationery, and paid half of her home broadband and telephone expenses. Those factors tend towards the relationship being one of employer and employee.

The control test

[43] Working from home meant that Ms Triggs had overall control of how and when she undertook the work. Although she was contractually obliged to work for 25 hours a week, JB did not monitor this in any way. JB expected Ms Triggs to make seven confirmed sales each full working week, taken on a monthly average. However, even in the earlier period of engagement JB did not complain to Ms Triggs or discipline her in any way for not meeting that target.

[44] During 2016, I consider JB had very little control over her work, even less than it did in 2015, before she terminated her contract.

Was Ms Triggs a homeworker?

[45] The leading case on the meaning of “homeworker” is *Cashman v Central Regional Health Authority*⁴. After examining the defining characteristics described by the Court of Appeal in the Cashman case, I consider Ms Triggs was not a homeworker.

[46] To have been a homeworker the place of work, Ms Triggs’ home, would have had to have been the only place JB would have allowed her to work, or put another way JB would have had to require her to work from her home. In this case, that was not the position. Instead, JB offered Ms Triggs the possibility of a return to working for it but in her own home, rather than at JB’s office, if that suited her own personal requirements more than working in the office.

⁴ [1996] 2 ERNZ 169

The fundamental test

[47] This test seeks to establish whether Ms Triggs was acting as if she was in business for herself.

[48] I accept that Ms Triggs did not engage an accountant or seek to claim work-related expenses against her income, although the only income tax return she has been able to provide was from the year ending 31 March 2016. I am unaware of what approach she took during her earlier period of engagement.

[49] Although Ms Triggs is not an experienced or sophisticated business woman I consider that she knew that employees did not pay their own ACC levies, which she did, and that employees got paid sick leave and paid annual holiday leave, which she did not.

[50] JB did not pay any employer KiwiSaver contribution although Ms Triggs contributed to KiwiSaver.

Conclusion

[51] Ms Triggs was not an employee, and, specifically, not a homeworker. Therefore, I have no jurisdiction to determine her claims.

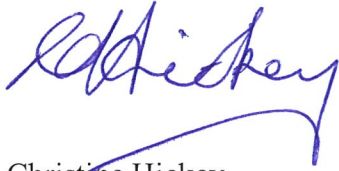
Costs

[52] Costs are reserved. JB, as the successful party, is entitled to a contribution towards its actual legal costs.

[53] I note that originally another former worker for JB lodged proceedings at the same time as Ms Triggs. The second applicant withdrew her claim and JB, through Mr Goldstein, has registered its intention to pursue its costs leading up to the date of withdrawal.

[54] The parties are encouraged to resolve costs by agreement. However, if that is not possible then JB has 28 days in which to file its cost submissions, Ms Triggs and the other applicant have a further 14 days to respond.

[55] The Authority is likely to adopt its notional daily tariff-based approach so the parties are invited to identify any factors they say should result in the notional daily tariff, of \$4,500, being adjusted. The investigation meeting went from 9.30 am until 3.30 pm, less than a full day.



Christine Hickey
Member of the Employment Relations Authority

