

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gordon Beck (Applicant)
AND Edge Real Estate Limited (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Adam D M Gallagher, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 12 October 2005
FURTHER EVIDENCE 21 October 2005
DATE OF DETERMINATION 25 November 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Mr Beck says that he was to be employed for a fixed term period from 2 August 2004 until 31 March 2005 by Edge Real Estate Limited trading as Gillmans Edge Real Estate Limited (“Gillmans”) to manage its Nelson office. He says that he was dismissed from his employment when the Nelson office closed in October 2004 and that the dismissal was unjustified. Mr Beck seeks compensation; payment for the balance of what he says is a fixed term agreement together with his holiday pay.

[2] Gillmans say that Mr Beck was not an employee. It says that it entered into a commercial arrangement with a company of which Mr Beck was a director, Stoke Real Estate Limited, to provide management services to Gillmans’ Nelson branch. On that basis it says the Authority does not have jurisdiction to hear Mr Beck’s problem. Gillmans say that even if they had not entered into the commercial agreement Mr Beck would have been engaged as an independent contractor.

[3] The main issue to be determined in this case between the parties is whether the applicant, Gordon Beck, was an employee of the respondent Gillmans.

[4] If the finding with respect to that issue is that Mr Beck was not an employee then the Authority does not have jurisdiction to investigate Mr Beck’s claim.

[5] If the finding is that Mr Beck was an employee then there are two issues that require determination. The first is whether Mr Beck was employed on a fixed term agreement and the second is whether he was unjustifiably dismissed.

The engagement of Mr Beck as Branch Manager for Gillmans Nelson office

[6] Mr Beck commenced his career in real estate in Nelson in November 1972 as a sales and marketing consultant. He had spent time since 1972 in various roles in the industry including as a salesperson and a branch manager.

[7] In or about May 2004 Mr Beck saw advertisements in the Nelson Evening Mail and NZ Real Estate for a Branch Manager for Gillmans. The advertisement provided amongst other matters:

Branch Manager – Nelson

This is an opportunity for a qualified Branch Manager to be part of one of the South Island's largest independent companies.

We are looking for a non-selling manager to grow, work with, support and encourage a team with a focus on increasing our market share.

The successful applicant must be self-driven, enthusiastic, goal orientated and want to be part of an exciting, expanding company.

[8] Mr Beck carefully considered whether or not to respond to the advertisement. He was at that time assisting his wife, who is a real estate agent with Harcourts. Mr Beck decided to respond to the advertisement and duly had a meeting on 9 June 2004 at the Honest Lawyer Bar and Restaurant with Mitchell Goodall, Director and Shareholder of Gillmans, and Michael Wilson who was at that time the branch manager at Gillmans Nelson office. The discussion during that meeting was of a general nature. Mr Goodall was impressed with Mr Beck and felt that he presented during the meeting as an astute businessman with significant experience in the real estate industry and in the Nelson market.

[9] Following the meeting Mr Goodall duly wrote to Mr Beck on 14 June 2004 and said in his letter amongst other matters:

.....it was a pleasure talking with someone who has similar philosophies on running a Real Estate Company.

With regards to the above, I am very happy to offer you the position of full-time Branch Manager at our office in Stoke.

The remuneration is a salary of \$50,000.00 (Fifty Thousand Dollars) per annum plus a bonus for each confirmed sale & purchase agreement.

Obviously there are more details to go into, however if you are happy with this offer and agree in principal to take up the position, please give me a call, then we can arrange a meeting and finalise all the details.

[10] Mr Beck accepted the offer in principle and proposed a further meeting to bring his wife into the picture and *sound out* local Harcourts management in terms of any conflict they may perceive.

[11] After some further discussion, Mr Beck emailed Mr Goodall on 22 June 2004. He proposed that the salary be paid monthly to a company he owned and was sole director of, Stoke Real Estate Limited (“Stoke”). Mr Beck said in his email that ... *our position is that we do not wish to increase*

our tax liabilities and to facilitate this our accountants have advised that it would be beneficial to ourselves if the salary was paid along the following lines: - That the salary be paid monthly to Stoke Real Estate Ltd a company owned by ourselves. Payment was proposed to be by Stoke rendering an account for office management services every month for \$4,166.66 plus GST. The email provided that Gillmans would reclaim the GST in its GST return and Stoke would pay the GST with the net effect on both being nil.

[12] Mr Goodall took some tax advice from Gillmans accountants, Pricewaterhouse Coopers on the legality and benefits of the proposal to pay Stoke for office management services. Following that advice he agreed to the proposal.

[13] Further negotiation took place during July 2004 with particular emphasis from Mr Beck about when the Nelson operation would be reviewed. Mr Goodall had initially said that the Nelson office would be reviewed in four months. Mr Beck felt that it was unreasonable to expect that an office could turn around in just four months. He requested that the review time be amended to the end of the financial year 31 March 2005.

[14] Mr Goodall then wrote to Mr Beck. It was agreed that the letter was incorrectly dated 19 April 2004 and was in fact sent on 19 July 2004. The letter I am satisfied was intended to record the agreement between the parties following the period of negotiations over June and July 2004. The letter provided:

Re: Branch Manager – Nelson

This is to confirm the appointment of Stoke Real Estate Ltd having the management services, with yourself as branch manager of the Nelson branch. The monthly payment will be \$4,166.66 plus GST commencing 19th July 2004 through to 31 March 2005 when this agreement will be reviewed.

Neither you nor any Officer of Stoke Real Estate Ltd will be either an employee or a contractor of Edge Real Estate Ltd, it is understood that during the course of this agreement your branch manager real estate licence will remain current.

Should either Stoke Real Estate or Edge Real Estate wish to terminate this agreement for whatever reason, they can do so by giving one months notice in writing to the other party.

Gordon, I am very pleased you have accepted this position, I feel very positive about the future and look forward to a long business relationship and you becoming part of the Gillman Team.

[15] Mr Beck said that he did not pay attention to or consider the one month's notice contained within the letter, relying instead on the discussions between him and Mr Goodall about the review time for the Nelson office. Mr Beck is an astute businessman and I am of the view it is unlikely that he would have simply disregarded the one month notice period in the letter. I do accept though that it was very important to Mr Beck, particularly in terms of his reputation, that he be given sufficient time to try to turn around the poorly performing office and he may well have assumed that it was unlikely that Gillmans would give one month's notice.

[16] Mr Beck commenced his engagement as Branch Manager with Gillmans on or about 2 August 2004. He spent about two weeks prior to that with Mr Wilson for a cross-over period. As a non-

selling manager there was reliance by Gillmans on his skill, knowledge and experience to motivate staff, increase sales and generally turn things around in the Nelson office.

[17] Mr Beck set the rules, budgets and expectations of the office including sales meetings and anything else to increase the profile of the company, office and staff. He was able to engage and dismiss staff. He accepted that the day to day running of the office was largely left to him and that he exercised a significant degree of control.

[18] Mr Beck was provided with an office and a desk. He provided his own vehicle and cell phone. Gillmans met the costs of business cards, the managers real estate licensing costs and the cost of airfares to attend a management meeting in Christchurch.

[19] Mr Beck generally worked 8.30am until about 5.00 pm and any additional hours that staff required assistance from him. Mr Beck was controlled in this respect by the demands staff made of him. The engagement was on a full time basis. Mr Beck knew, even though it was probably not specifically discussed, that it would not be acceptable for him to associate with another company.

[20] It is not Gillmans practice to employ their selling/non-selling branch manager. Gillmans other managers are engaged on a principal/contractor basis. I did not hear sufficient evidence for me to conclude that this is a standard and accepted practice industry wide but I took account of Mr Beck's evidence that when he was a branch manager with another real estate agency withholding tax was deducted from his payments. He also said that in the thirty years he had been in New Zealand and involved in the industry he had never received holiday pay. This suggested to me that Mr Beck's previous engagements in the industry had not been under contracts of service.

[21] Gillmans made a decision to close the Nelson office in mid-October 2004 as it decided it could not continue to sustain the losses from the office. Mr Beck said that he was advised *out of the blue* that office closure was likely on 29 September 2004. He wrote to Mr Goodall in an attempt to have Gillmans reassess the decision. Gillmans decided however to close the Nelson office on 27 October 2004 and gave Stoke one month's notice of termination of the agreement for management services from 15 October 2004.

The Legal Position

[22] Only an employee may pursue a personal grievance under the Employment Relations Act 2000. Section 6 of the Act provides the meaning of employee in subsection 6 (1) as *any person of any age employed by an employer to do any work for hire or reward under a contract of service....*

[23] Section 6 (2) of the Act provides that to decide for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Authority *must determine the real nature of the relationship between them*. For the purposes of subsection (2), subsection 3 provides that the Authority must consider all relevant matters, *including any matters that indicate the intention of the persons; and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*.

[24] It is important to note for the purposes of this case subsection (4), which specifically provides that subsections (2) and (3) do not limit or affect the Real Estate Agents Act 1976.

[25] In ascertaining what the relevant matters are that the Authority must consider for the purposes of section 6 there is guidance from the Employment Court judgment of *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581. The judgment although overruled on appeal to the Court of Appeal was upheld by the Supreme Court *Bryson v Three Foot Six Ltd* (2005) 2 NZELR 137 (SC).

[26] Judge Shaw summarised in *Bryson* at paragraph 19 of the judgment the principles established by Employment Court cases on section 6 together with the matters that are relevant. Such summary was held to be accurate by the Supreme Court and set out in paragraph 5 of its judgment as below:

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.

The real nature of the relationship can be ascertained by analysing the tests that have 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.

[27] I also accept as submitted by Mr Gallagher that there are some similarities between this matter and the Employment Court judgment in *Curlew v Harvey Norman Stores (NZ) Pty Limited* [2002] ERNZ 114 although whether a person is an employee or not will depend on the facts in each situation.

Determination

[28] The parties had turned their minds to the nature of their relationship before Mr Beck’s engagement with Gillmans following discussions over several weeks. Both had taken advice from their respective accountants.

[29] In the Employment Court judgment in *Bryson Shaw J*, at paragraph 35, concludes from the evidence with respect to Mr Bryson that *he did not turn his mind to the nature of employment when he began working with Three Foot Six. He simply accepted the employment that was offered because he saw the opportunity to gain more skills.* Unlike Mr Bryson, Mr Beck carefully considered the engagement with Gillmans. Whilst accepting the offer contained in the 14 June 2004 letter in principle he then proposed a monthly payment by Gillmans to Stoke with that company rendering an account for office management services. Such a payment had a GST component and the proposal had tax benefits. Mr Beck during the negotiation expressed his concern about the review period proposed by Gillmans. The concern about the review period was reflected in the increase of the period for review to 31 March 2005 in the letter of 19 July 2004.

[30] The letter of 19 July 2004 sets out the agreement between the parties. Stoke was to provide management services and Mr Beck was to be branch manager of Gillman’s Nelson office. There was an intention expressed within the letter that Mr Beck was not to be an employee or a contractor of Gillmans. Considering that letter in terms of the negotiations, the independent advice from the accountants and the inconsistency of the proposed scheme for payment with an employment relationship I am satisfied the nature of the relationship intended by both parties was other than an employment relationship. Mr Climo referred me to the Court of Appeal judgment *Telecom South v Post Office Union* [1992] 1 ERNZ 711 where a provision within the contract with respect to payment of salary to Mr Devlin’s consulting business did not change the underlying relations

between the parties of employer and employee. In that case though the contract was described as a contract of employment and except for the provision about payment of salary had all the indicia of a permanent employment contract. That case is distinguishable from this case because the relationship by virtue of the letter of 19 July 2004 was clearly structured as one for the provision by Stoke of services to Gillmans.

[31] I now consider the reality of the relationship between Mr Beck and Gillmans.

[32] I have found the parties intended that their relationship be something other than an employment relationship and structured that accordingly as reflected by the letter of 19 July 2004. Consistent with this there was no discussion as to terms and conditions of employment including holiday pay, leave including pay for sick leave and hours of work.

[33] Mr Climo argued that the terminology in some of the letters from Gillmans, such as salary, indicated a contract of services. Both Mr Beck and Mr Goodall used language even during the investigation meeting that was ambiguous and I do not think this is a case where terminology assists me in determining the real nature of the relationship. Mr Beck referred to his wife as an employee although accepted that his wife was an independent contractor.

[34] Mr Beck was provided with an office and desk but provided his own vehicle and cell phone for which expenses could be claimed rather than reimbursed as would be usual for an employment relationship. Mr Beck was engaged essentially full time although I accept that it would not be usual practice for a branch manager in Gillmans and probably in the real estate industry generally to work for other organisations in the real estate industry at the same time.

[35] Gillmans paid for Mr Beck's real estate licence, business cards and air travel and his work was integral to the Gillmans business. The assistance provided to him by Gillmans was not I find inconsistent with the support provided by Gillmans under its agency banner to its other branch managers and salespersons to assist them generate a profit.

[36] Stoke received a set monthly fee regardless of sales but this was on the basis of a monthly tax invoice generated by Stoke to Gillmans.

[37] Mr Beck exercised a considerable degree of control as branch manager of the Gillmans office and worked unsupervised. His hours of work were not set by Gillmans but rather by the demands of his staff.

[38] I have considered the fundamental test. Mr Beck brought considerable experience and skills to Gillmans by virtue of 30 years in the real estate industry. There was ability to profit from increased sales and continuation of the Gillmans operation in Nelson because of that skill and knowledge, independent from Gillmans.

[39] In weighing up all of the factors of the relationship I am satisfied that, although there are some employment indicia the real nature of the relationship between Mr Beck and Gillmans was intended to be and was other than an employment relationship. The Employment Relations Authority does not have the jurisdiction to investigate the matter further.

[40] It is understandable that Mr Beck would be upset that the office closed after such a short time. He felt that he was not given a fair opportunity to turn the office around. That of itself though does not change the real nature of the relationship between the parties.

Costs

[41] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority