

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 478
5406051

BETWEEN

JANET ROSA CALDER
Applicant

A N D

NEW ZEALAND
PROFESSIONAL FISHING
GUIDES ASSOCIATION INC
Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant
Dean Bell, Advocate for Respondent

Investigation Meeting: 11 October 2013 at Gisborne

Date of Determination: 17 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Calder) alleges that she was unjustifiably dismissed from her employment with the respondent (the Association) while the Association contends that Ms Calder was never an employee but was an independent contractor to the Association.

[2] Although Ms Calder makes other claims consequential to her claim to have been unjustifiably dismissed from her employment, the Authority agreed with the parties that the question of the status of the relationship between these parties would be dealt with first as a preliminary matter. That is the sole purpose of this determination.

[3] Ms Calder was approached by the then President of the Association, Mr Frank Murphy, to act as Secretary of the Association. This happened in April 2010. It is

common ground that Mr Murphy wrote to Ms Calder and effectively sought her assistance. Mr Murphy and Ms Calder were known to each other. Mr Murphy was based in Gisborne as was Ms Calder.

[4] It is also apparent on the evidence the Authority heard that Mr Murphy had authorisation from the Association to make the approach to Ms Calder. There had been a meeting of the Executive Committee of the Association in Wellington on 15 April 2010 at which Mr Murphy was given the authority to “*seek out possibilities for a new secretary*” and, in particular, Mr Murphy was given authority to approach Ms Calder (who Mr Murphy had recommended) to act as interim secretary.

[5] Mr Murphy’s evidence was that he intended to recommend Ms Calder’s appointment to the secretaryship on a permanent basis, assuming that she was prepared to accept the position and the Executive Committee had met her.

[6] Mr Murphy also gave evidence that he was to engage with Mr Neil Goldie in relation to the terms and conditions of her permanent engagement. That much is common ground.

[7] However, Mr Murphy and Mr Goldie have entirely different recollections of what the two men agreed. Mr Murphy is adamant that he and Mr Goldie agreed on an employment relationship while Mr Goldie is equally clear that a contractual relationship was in prospect.

[8] Whatever the arrangements made by the two men were, the fact remained that only Mr Murphy engaged directly with Ms Calder in the formation of the engagement and the continuing contact between Ms Calder and the Association remained primarily through Mr Murphy.

[9] This was partly because Mr Murphy was the President and so the relationship of president to secretary was a natural one, but it is more importantly because Mr Murphy was the only member of the Executive Committee of the Association who was based in Gisborne, where Ms Calder was based. The Authority is satisfied that the secretaryship of the Association had been based in Gisborne for a number of years prior to Ms Calder’s engagement and that was primarily because Mr Murphy had been the President of the Association for many years.

[10] The Association's Executive Committee was comprised of representatives of the Association equally drawn from the North and South Islands and so the effect of the structure was to scatter the Executive Committee members across the country. Inevitably then, the day-to-day contact between Ms Calder and the Association was channelled through Mr Murphy, although the evidence is clear that Ms Calder had occasional contact from the member of the Executive who held the administration portfolio. At the time of her engagement, this was Mr Goldie but other persons filled that role later on.

[11] Mr Murphy told the Authority that at an early stage he asked Ms Calder to prepare a job description and while her evidence is that she commenced that task, it is apparent that it was never completed. Nor was there ever a completed employment agreement nor even a draft version.

[12] The tasks that Ms Calder was asked to undertake fell broadly into two categories. The first, and probably the least time consuming, were the traditional tasks that one would expect of the secretary of a voluntary organisation. These included the basic administrative duties of maintaining the membership base, preparing correspondence, attending to the preparation and actioning of minutes and generally ensuring that the affairs of the Association were conducted in a businesslike fashion.

[13] The other task identified by Mr Murphy was to inquire into the financial performance of the Association and identify if there had been any wrongdoing. Mr Murphy had received a report from Ms Calder at a very early stage in her secretaryship which indicated her growing concern about financial irregularities. Mr Murphy, not unnaturally, asked Ms Calder to investigate further. That aspect became a significant part of Ms Calder's duties culminating in a settlement with the Association's bank and an unsuccessful prosecution of the former secretary in the criminal Courts. By the middle of calendar 2012, work associated with the alleged defalcation had come to an end and the relationship was brought to an end effective 27 May 2012, although work actually continued beyond that date.

Issues

[14] The Authority is satisfied that the most convenient way of considering the issues in this case is by reviewing the arguments assembled by each side in turn.

[15] On that footing then, the Authority will first consider the evidence for an employment relationship and then the evidence for a contractual relationship.

The applicant's position

[16] Ms Calder says she was an employee. That is also the view of Mr Murphy who, as the Authority has just explained, was the principal point of contact between Ms Calder and the Association and, critically, the only point of contact when the relationship, whatever it was, was formed.

[17] Ms Calder says that she was paid wages. Her evidence is that she made claims via email for payment of wages based on the hours that she had actually worked. Those emails were sent to a member of the Executive Committee of the Association to get approval for the payment. Once approved, Ms Calder then paid herself from Association funds. These emails are, with one exception that the Authority will refer to shortly, just an email advice from one individual to another individual seeking payment. They are not in the form of a tax invoice nor are they a timesheet or any other recognisable document.

[18] For instance, on 20 March 2012, Ms Calder sought payment from the Executive Committee member responsible for administration in the following terms:

Hi Bryan

As per your December 2011 memo

Wages December 2011 January February March 2012 10 hours per week x \$12.20 per hour = \$128 per week x 16 weeks = \$2,125 ... (I pay my own tax) ...

[19] In actual fact, this particular email appears to have an arithmetical error; the hourly rate should in the Authority's opinion be \$12.50 an hour because Ms Calder's actual hourly rate was \$25 an hour but she undertook to work for half pay because of the Association's financial predicament. That aside, the email is typical of the evidence the Authority saw.

[20] In the email just quoted, Ms Calder makes the point that she paid her own tax. Her evidence on this point is very clear. She said she undertook to arrange tax matters herself and while the Association may have taken that observation to mean that she was a contractor, in fact Ms Calder's evidence to the Authority was that she set up her

arrangements with the Inland Revenue Department on the basis that she was an employee.

[21] Only one of the emails from Ms Calder seeking payment is in any way different from the others because it includes the use of the word “invoice”. Ms Calder’s evidence on this point is that the Executive Committee member responsible for administration at the end of her engagement insisted that she include that word in her email in order to obtain payment. The email trail is clear that Ms Calder had attempted to obtain payment in the way that she had always done, without using the word “invoice” but the new Executive Committee member required the use of the word “invoice”. While it is clear that the word “invoice” is used, it is equally plain that the expression “tax invoice” is not used and nothing about the email just referred to suggests a tax invoice. Furthermore, Ms Calder’s oral evidence to the Authority was as plain as could be that she was not registered with the Inland Revenue Department on any basis which would have entitled her to issue a tax invoice for services.

[22] Evidence for Ms Calder draws the Authority’s attention to the fact that there is nothing in the evidence provided of the minutes of the Association indicating that the Association intended to engage with Ms Calder as a contractor, although it might be more accurate to say that there was no evidence before the Authority that the Association ever turned its mind to the question whether Ms Calder was going to be an employee or a contractor. The issue simply does not seem to have ever been minuted, even if it was discussed.

[23] Further, Ms Calder points to the existence of a number of documents which she says suggest an employment relationship rather than a contractual one. These documents were all controversial at the Authority’s investigation meeting and subject to countervailing arguments from the Association. The first of these documents is the existence of a business card for Ms Calder as Secretary of the Association. Her evidence, which is not disputed, is that Mr Murphy instructed her to arrange this. She says this suggests an employment relationship.

[24] More importantly, Ms Calder seeks to rely on a document dated 19 April 2010 which is signed by her as Secretary and Mr Murphy as President and which is on the Association’s letterhead. The document was prepared to enable Ms Calder to engage with the Association’s bank and other agencies while pursuing the alleged financial

irregularity. But its importance for the present dispute is that it refers to the engagement of Ms Calder as “employment”, refers to a “wage” for Ms Calder and refers to the fact that she will “*take care of all the administration of that wage herself*”. It refers three times to a job description and notes that Ms Calder will be working under the close direction of Mr Murphy and the administration portfolio of the Executive Committee of the Association.

[25] In a similar connection, Ms Calder relies on certain extracts from the minutes of various Association meetings but again these are subject to challenge by the Association on the footing that they are not true and correct records of the meetings in question.

[26] Finally, Ms Calder relies on the fact that she maintains that some former secretaries of the Association have also been employees. The Authority heard evidence which suggested that at least two of Ms Calder’s predecessors were employees, although that is disputed by the Association.

The respondent’s position

[27] The Association maintained that it had only ever engaged persons to fulfil the secretarial role as contractors and never as employees. As the Authority has just noted, that evidence is open to question because two of Ms Calder’s predecessors appear to have been employees. There was oral evidence to that effect from Mr Murphy, as well as a statement filed by one of the predecessors stating she was an employee.

[28] Further, the Association maintained that the documentary evidence supported its view that Ms Calder was always a contractor. The Authority certainly does not accept that proposition. In fact, there is no minute before the Authority that would indicate that the Association ever even considered the matter.

[29] The Association stoutly maintained that it had never intended to engage Ms Calder as an employee and that that was consistent with its past practice. As the Authority has already observed, its past practice is open to doubt given it seems more likely than not that two former secretaries were employees. Moreover, the oral evidence from the Association was primarily not a first hand account of what happened at the time, but rather a gathering together of material relaying what persons not actually present to give evidence, could recall.

[30] Moreover, the Association's evidence on its intentions was effectively negated by the evidence of Mr Murphy who was their President at the time and who engaged Ms Calder. The Association sought to minimise the effect of Mr Murphy's evidence by maintaining that his evidence could not be relied upon. The Authority was not persuaded by this contention and found no reason to discount Mr Murphy's evidence, notwithstanding the apparent breach between Mr Murphy and the Association. In the Authority's opinion, whatever the issues between Mr Murphy and the Association, his evidence in this matter was truthful and could be relied upon.

[31] The Association contended that there was no proper basis on which Ms Calder was provided with business cards because there was no resolution to support that provision. This is true as far as it goes but Mr Murphy told the Authority he authorised it and it was necessary for her to be identified as part of the Association. They also maintained that she could not rely on the document dated 19 April 2010 which was signed by both herself as Secretary and Mr Murphy as President. The Association maintained that this document had been "manufactured". Although it is dated 19 April 2010, the Association maintained that it first appeared on the Association's computer on 16 December 2011 and that the file was entered and re-entered multiple times on that date and then again on 1 and 2 January 2012. It was suggested that, in consequence, the Authority could not place any reliance on this document.

[32] For the record, the Authority is not persuaded the sinister connotation placed on events can be made out. Ms Calder's evidence is that the 19 April 2010 document was originally on her own computer which was stolen and that she re entered it into the Association's computer on 16 December 2011, from a hard copy, and then subsequently corrected it several times. Nor is the Authority much taken with the argument that, if Ms Calder was subsequently going to rely on this document, she would have made its existence known to the Association earlier. That argument presupposes prescience which Ms Calder may not possess. In any event, when she did produce the document to the Association on 2 January 2012, she may have been reminded of its existence by Mr Murphy who she specifically referred to in her email of that date.

[33] Similarly, the various minutes that Ms Calder sought to introduce into evidence were objected to by the Association on the footing that they too were either

“manufactured” or, in the alternative, were draft minutes that were not approved by the Chairman of the meeting in question. That view just mirrors Ms Calder’s allegations that the Association has itself manufactured evidence, especially minutes, to support its position and sought to blacken the name of Mr Murphy because his evidence is inconvenient in this dispute.

[34] While the Association agrees that Mr Murphy was given the obligation of approaching Ms Calder to be engaged as secretary, it maintains that Mr Goldie’s evidence of the nature of the engagement is to be preferred over Mr Murphy’s. The Authority places more reliance on Mr Murphy’s evidence because, unlike Mr Goldie, Mr Murphy was physically present when the engagement was formed.

[35] The Association relies on the fact that Ms Calder told it that she was arranging payment of her own tax and it maintains that Ms Calder’s regular requests for payments of her services amount to evidence of her submitting invoices. It is true that Ms Calder told the Authority she was arranging the payment of tax but that could mean she was attending to payment, as the Secretary of the Association. In any event, the Authority is satisfied with Ms Calder’s evidence that she was an employee for tax purposes and that that is what she told the Inland Revenue Department. The contention that Ms Calder was submitting invoices is just wrong; what she was doing was sending emails asking for payment. Whatever else these documents are, the Authority is satisfied they are not tax invoices.

[36] The Association also maintains that because Ms Calder was effectively not just providing the usual services of an association secretary but was also conducting an investigation into the alleged previous defalcation, the role contemplated went far further than would have been the position were an employed secretary to be involved. It is true that Ms Calder was providing two distinct services but that fact does not assist in identifying Ms Calder’s status; she could just as easily be employed as contracted.

[37] The Association says that Ms Calder operated on her own hours, that she was not supervised directly or closely, and that when the engagement finished in 2012, Ms Calder did not ask for payment of her holiday pay which she would have been entitled to if she were an employee. The first of these points is denied and the Authority prefers Ms Calder’s evidence that she was closely supervised, especially by Mr Murphy. The second point is a fair one; Ms Calder said she simply did not think to

ask for holiday pay when she left and that, in any event the Association did not offer holiday pay.

Determination

[38] Mr Murphy's evidence, which was absolutely consistent with Ms Calder's evidence, was that the nature of the relationship he offered Ms Calder was one of employment, that that had always been his understanding and that he now regretted not appropriately documenting the relationship, as he should have.

[39] Of course, the fact that Mr Murphy and Ms Calder both say this is a relationship of employment does not make it so. But it does make it more difficult for the Association to maintain, as it does, that it was never in its contemplation that the engagement with Ms Calder would be one of employment.

[40] The law requires the Authority to assess the real nature of the relationship and as the Employment Court set out in *Tsoupakis v. Fendalton Construction Ltd* (Employment Court, Wellington WC16/09, 18 June 2009, Chief Judge Colgan), the twin pillars of the Authority's inquiry must be the Supreme Court decision in *Bryson v. Three Foot Six Ltd (No 2)* [2005] ERNZ 372 and s.6 of the Employment Relations Act 2000 (the Act). *Tsoupakis* goes on to emphasise that "*the inquiry ... is intensely factual*."

[41] Chief Judge Colgan then lists the principles to be applied and amongst those principles includes the following passage:

Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operates in practice, it will not usually be possible to examine the relationship in the light of the control integration and fundamental tests.

[42] As well as recording the definition of an employee from s.6 of the Act, His Honour refers to the fact that "*all relevant matters*" includes the intention of the parties, although that is not determinative, the nature of any arrangements made between the parties and any divergences from those arrangements over time, industry practice and taxation arrangements.

[43] Looking then first at that "*intensely factual*" situation in the present case, it is apparent first that the parties actually present at the formulation of the arrangement believed that they were creating an employment relationship. Whether Mr Murphy

exceeded his authority in doing that is neither here nor there; Ms Calder was entitled to expect that as President of the Association, Mr Murphy had power to act. In any event, even if the Association now says that Mr Murphy had no such authority, there is no evidence whatever that the Association ever turned its mind to the particular nature of the relationship. Even the evidence the Authority heard from the present President of the Association proceeds on the footing that his evidence is effectively an amalgam of his own research on the issue, rather than his personal knowledge. On that footing alone, it is difficult to reach any conclusion other than the obvious one that Mr Murphy's evidence must be preferred.

[44] Next, the language the parties used to describe the engagement tends to suggest an employment relationship. The expression "wages" is used often, as are expressions such as "back pay" and more occasionally "employment". However, the Authority is cautious about placing too much weight on the documentary evidence, preferring the oral evidence that it heard. The reason the Authority is cautious about the documentary evidence is because of competing claims by each party that the other had manufactured documents to facilitate its argument. Both parties made this claim against the other and rather than sift through every document (of which there are an inordinate number), and make judgments about the veracity of each, the Authority thinks it best to rely on the documents that were not challenged by one side or the other, and the oral evidence.

[45] In that regard then, a trail of documentary evidence that can be relied upon as not been in any way controversial is the claims for wages made regularly by Ms Calder and regularly paid by the Association. Despite the Association's submission on the point, nothing in that regular email traffic between the parties suggests the rendering of invoices. As a matter of fact, none of the emails constitute a tax invoice within the meaning that expression has in tax law, and only one of the emails actually uses the word "invoice" and then not in the context of a "tax invoice".

[46] Furthermore, Ms Calder, on the evidence the Authority heard, worked under instruction from the President or an Executive Committee member. Again, despite what the Association maintained, she worked a span of hours that was agreed by the Association, either by Mr Murphy as President or by another Executive Committee member. She did particular tasks that were required of her by the Association.

[47] While the Association maintains that she “*paid her own tax*”, her evidence was that she told the Association that she would attend to that matter herself and that is precisely what she did, but she attended to it on the footing that she remained an employee for the purposes of the Inland Revenue Department. The Authority heard nothing that suggested that Ms Calder was in business on her own account doing other work of the sort she performed for the Association. She gave clear evidence on oath that she had only ever worked as an employee in this jurisdiction.

[48] To conclude matters, the Authority must look in turn to each of the common law tests. Turning to the control test first, the essence of this test is to decide whether the person doing the work is controlled by the person providing the work. The Authority is satisfied that Ms Calder neither chose what work she would perform nor indeed how she would perform it. All of the evidence the Authority heard suggested that Ms Calder was under very direct control, particularly from Mr Murphy. He was the only member of the Executive of the Association who lived in the same community as Ms Calder and he told the Authority that he attended at the office on a regular basis in order to instruct Ms Calder and her evidence was in similar terms.

[49] In addition, Ms Calder worked from Association premises for nearly all of the engagement and the facilities she needed to fulfil her obligations to the Association were not provided by her.

[50] Looked at in the round, Ms Calder appears to have had her work controlled by the Association, principally through Mr Murphy.

[51] Applying the integration test, the Authority seeks to assess the extent to which the person providing the services is integrated into the organisational structure of the other party. Ms Calder appears to have been integrated into the affairs of the Association in a real sense. She attended meetings of the Association to take minutes, maintained a watching brief over the Association’s website so as to deal with any inquiries, and by virtue of the particular obligations that she had in trying to resolve the Association’s financial issues, she was held out as being integral to the Association’s engagement with other entities such as the auditors, the bank, and latterly the Police.

[52] On the face of it, the Authority is satisfied that Ms Calder appeared to be “part and parcel” of the Association’s activities, both in its general activities and in the particular involvement with resolving the Association’s financial affairs.

[53] Looking at the fundamental test, the question here is whether Ms Calder was, in truth, working on her own account or not. The Authority is satisfied that there is no evidence that she was working on her own account. Her evidence was that she was only an employee in New Zealand and that she had no other roles that were analogous to her role as Secretary of the Association.

[54] Ms Calder had no employees and always provided her services in person. She took no financial risk of the sort contemplated by the old maxim “*the chance of a profit and the risk of a loss*”.

[55] All the requirements of the role, including premises, equipment and materials, were all provided by the Association.

[56] The Authority is satisfied then that the real nature of this relationship was one of employment. Despite the Association’s efforts, the Authority prefers Mr Murphy’s evidence on the formation of the relationship and is satisfied that he, representing the Association, proposed an employment relationship which Ms Calder accepted, that she then proceeded to make claims for wages, having arranged her tax affairs with the Inland Revenue Department so as to record her as an employee, and that she took no steps that would indicate that she was in business on her own account.

[57] Ms Calder took direction from the Association’s Executive members, particularly the President, she worked principally in premises and using facilities and materials provided by the Association, she never sought to contract for other similar work, her tax status was that of an employee, and in consequence she made no claims in respect of expenses which a contractor would make.

[58] The Authority concludes then that Ms Calder was an employee. It follows from that conclusion that Ms Calder has the right to make claims in the Authority in respect of her engagement by the Association, not only in respect of holiday pay which has been quantified, but also in regard to other normal incidents of employment.

[59] In the normal course of events, the Authority would, in such circumstances, refer the parties back to mediation with a view to seeing if they could now resolve their differences by agreement, the Authority having determined that this was a relationship of employment.

[60] However, because the Association's Executive is so spread out geographically, a mediation would be logistically challenging to organise.

[61] Accordingly, the Authority directs that Mr Austin, the advocate for Ms Calder, is to engage with the current Chairman of the Association with a view to trying to resolve matters by agreement. Either party (and particularly the Association) may engage other persons to participate in that exchange of views.

[62] The Authority leaves it to Ms Calder and her advocate to advise the Authority if they are unable to resolve matters on this basis and should that be the position, the Authority will timetable a telephone conference to agree a process for concluding matters between the parties.

Costs

[63] Costs are reserved.

James Crichton
Member of the Employment Relations Authority