

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Carolyn Ruve Carter
AND Turnaround Managers Ltd
REPRESENTATIVES Applicant in person
Don Cowie, Director for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 14 November 2006
DATE OF DETERMINATION 14 December 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Carter was employed by the respondent ("TML") in September 2003 to provide financial services to the respondent's clients. Her employment relationship problem concerns a claim for arrears of wages and holiday pay which she says was outstanding in November 2004 when her employment ended.

[2] Mr Cowie told the Authority that it had been agreed that Ms Carter would be an employee rather than a contractor because this enabled the provision of accounting services to clients "under a single TML umbrella." He said that at the time she signed her employment agreement he had explained to her that the difficult circumstances faced by many of the companies for which TML worked meant that payment was always uncertain. He said that he made it clear to Ms Carter that, pursuant to the agreement she would only be paid when a contract for accounting services had been signed by the client company and when payment had actually been received. He said this is set out in Schedule 1 of her employment agreement, which states:

"Full time Base Salary: 80% of the net revenue, excluding GST, received by TML from financial management assignments contracted to by TML involving the employee. The initial monthly time commitment is 24 % of full time monthly equivalent or \$2,000.00 per month. This salary to be capped at \$104,000.00 per annum for a full time role."

[3] Ms Carter's hours and remuneration varied depending on the work available and she supplemented her income with lecturing work. Apart from this lecturing work, she says she worked exclusively for the respondent until November 2004 when, with the respondent's agreement¹, she set up her own company and began working directly for some of the respondent's former clients.

[4] This dispute concerns work she did for two of those clients "GSE" and "Silver Tiger" during July, August, September and October 2004. She says she did this work in her capacity as an employee of the respondent, on the instructions of Geoff Turner who was at that time a director of the respondent. She says it was the respondent's responsibility to bill these clients in the normal way and to pay her for the work she did.

¹ The respondent's agreement was expressly required as, pursuant to her employment agreement, Ms Carter was subject to post employment restraint of trade provisions.

[5] Mr Cowie, who represented the respondent at the Authority investigation meeting, acknowledges that he had very little direct contact with Ms Carter during the period in question, when she worked under the direction of Geoff Turner. He says that TML had not contracted with GSE to provide accounting services to them after July 2004 and he specifically instructed Mr Turner that from July onwards Ms Carter was to cease work for GSE on behalf of the respondent. Mr Turner was also, at the time, a director of GSE, and Mr Cowie says that from July onwards, any instructions Mr Turner gave Ms Carter were given in that capacity and not as a manager for the respondent. Work she did for GSE between July and October was therefore done on her own behalf, and GSE was her client, not the respondent's client.

[6] Mr Cowie also told me that he construes the employment agreement (as quoted above) to mean that even if Ms Carter had provided services to these clients on behalf of the respondent, it was under no obligation to her unless payment was received from the clients. He says the respondent received no payment from either GSE or Silver Tiger for the work in question and so bears no liability to Ms Carter.

[7] Mr Cowie does not dispute that the respondent owes outstanding holiday pay to Ms Carter. In a telephone conference on 16 October the parties agreed that the issues for determination were:

- i. *"Whether work performed by Ms Carter for clients referred to as "GSE" and "Silver Tiger" in the period July-October 2004 was performed in her capacity as an employee of the respondent or on her own account;" [and]*
- ii. *"If it was performed on behalf of the respondent, whether she is owed remuneration for that work pursuant to her employment agreement with the respondent."*

(i) Whether the work was performed as an employee of the respondent.

[8] In February 2004 TML entered into a contract to provide turnaround services to a group of three companies that proposed to amalgamate to form a new entity, GSE. TML's fee for completing the turnaround and amalgamation was to be \$50,000.00 plus GST, with payment deferred until the amalgamation was complete and the new entity was incorporated. Ms Carter (who was involved right through this project) agreed with Geoff Turner that she would wait for her own payment (\$15,000.00) until completion when TML invoiced GSE.

[9] The amalgamation was complete, and GSE incorporated, by April 2004 but by July 2004 Ms Carter had not been paid. At that point Geoff Turner reported to Ms Carter that GSE had requested that she supply a personal invoice. Having already waited four months for payment, she did as requested and received her payment of \$15,000.00. Ms Carter told me that she understood from Mr Turner that this direct payment was to replace TML salary payments for the company amalgamation assignment only.

[10] After the amalgamation (on Mr Turner's instructions) Ms Carter prepared accounts for GSE for the months of April/May combined and for June. In July 2004 TML signed a further contract with GSE for management services only. Regular monthly accounting services were specifically excluded. However, Ms Carter (who had no knowledge of the terms of this contract²) continued as before to provide monthly accounting services to GSE for the months of July, August, and September. She also continued to receive regular salary payments (retrospectively) until September 2004 after which they ceased without any prior warning to her. She says she went on to do the October accounts before resigning her employment.

[11] Ms Carter pointed out to me out that as part of this work, in GSE's accounts each month, she recorded an accrual note of fees owed to TML. She said that this note was never queried by GSE, TML or Geoff Turner.

² It was not until she saw the respondent's reply to her statement of problem that she heard that accounting services had been excluded from the respondent's July contract with GSE.

[12] Ms Carter tendered her resignation to Mr Turner in late October 2004, writing:

"Further to our meeting last week I have summarised the monies due to me from TML for salary as contracted.

As discussed I agree that my being an employee with TML has not worked as intended and that when we work together in the future it would be preferable for me to be a separate entity and to bill companies directly for the financial aspects of the turnaround work...

As the employment agreement requires a notice period I am assuming that our employment arrangement will cease at the end of November 2004. Please advise if this is a problem. ...

While I have appreciated being part of the TML team and look forward to a continuing business relationship with the firm...I have found non payment of my salary extremely frustrating and am concerned that you have not promptly invoiced clients for the work done. I feel that it is now your responsibility to make payments to me for work done on TML's behalf regardless of any payment arrangements or otherwise you have with your clients..."

[13] Ms Carter says that at the end of her employment payment for the work done on GSE accounts for July to October remained outstanding, along with that for work for Silver Tiger, for which she had received no payment at all. She understood the respondent's agreement with GSE was for services to be provided for \$2,500.00 per month, of which she further understood \$2,000.00 per month would go to her. (This was what she got for April, May and June.) She has based her claim on these figures. Other than holiday pay, all other work performed during her employment had been paid in full.

[14] On 8 February Ms Carter emailed Mr Turner saying:

"Subject: Payments due 6 months

Further to our meeting in November to discuss this issue, several emails and one on one requests I am still waiting for TML to honour its financial obligations to me as its previous employee and note that I have not received my salary in line with my employment contract...I am not receiving any form of regular payment towards arrears and whilst still being asked to undertake urgent work for TML clients so they can bring in additional funds, supposedly from which I will be paid

...

I am sure I do not need to point out the obvious, that failing to invoice your client by accident or design does not negate your responsibility to pay me."

[15] In this email Ms Carter sets out the amount owed as being:

i. Holiday pay	\$4206.00
ii. GSE July 04 accounts work	\$2000.00
iii. GSE Aug 04 accounts work	\$2000.00
iv. GSE Sep 04 accounts work	\$2000.00
v. GSE Oct 04 accounts work	\$2000.00
vi. Silver Tiger work to Oct 04	\$2000.00
vii. Holiday pay due on un-invoiced work ³	\$800.00

Total **\$15,006.00**

[16] On 24 February Ms Carter followed this up with:

"Geoff, have you banked any money into my account yet, I will be desperate when I get back Monday."

³ Ms Carter has provided the Authority with payslips confirming holiday pay outstanding at the time her employment ended

[17] On 16 March Mr Turner issued an invoice to GSE, on TML letterhead, for \$13,500.00 for "Accounting work carried out by Carolyn Carter."⁴ With it went a cover letter which read: "Attached is the account for services supplied to GSE through TML by Carolyn Carter (accountant.) This account has been held back for the past six months due to the financial situation of the company."

[18] Ms Carter says that \$8,000.00 of this invoiced amount was owed to her. She also said that the invoiced amount was more than she thought GSE would have owed for her services (\$12,000.00 excl GST instead of \$10,000.00.) She cannot explain this and suspects that Mr Turner may have loaded the payment which should have come from Silver Tiger onto the GSE invoice.

[19] In May she emailed Mr Turner again, this time copying the email to Mr Cowie, and noting her concern that GSE had not been invoiced until March. In August 2005, after Ms Carter's solicitor had written to the respondent formally setting out her concerns, Mr Cowie replied saying: "I have taken steps to see the GSE invoices are immediately paid to Carolyn." In September, however, Mr Cowie wrote again to Ms Carter's solicitor saying that he had recalled the invoice issued to GSE in respect of Ms Carter's services as it was "issued without authorisation". He explained this to me by saying that Mr Turner had issued the invoice without going to the respondent's office manager as was the usual procedure.

[20] Attached to the respondent's statement in reply was a letter from Mr Turner dated February 2006 (on GSE letterhead) in which he asserted that the claims by Ms Carter were the direct responsibility of the GSE Group. Mr Turner is no longer associated with the respondent and could not be contacted to give evidence in the Authority's investigation and explain this apparent change in his position.

[21] I did however hear from a former employee of GSE. This person, Malcolm Goer, was responsible for many of the financial and corporate service functions of GSE, although he was not privy to the contractual arrangements entered into by the principals of the company. He told me that Ms Carter was originally introduced to him as an employee of TML and he worked with her on that basis. He was not aware of any change to this status until November 2004 when he understood she commenced work for GSE on her own account after having negotiated fresh terms for provision of her services. He also told me that he recalled TML having invoiced (via Mr Turner) after the amalgamation was completed. He was uncertain when these invoices stopped coming or whether they were for accounting services but believed they covered the period April-June. He does not think they were ever approved for payment. However GSE set up a weekly automatic payment to TML in about August or September. He is not sure whether that payment related just to the fee for the merger, or other services as well. He recalls one subsequent invoice that was recalled but cannot recall when it was.

[22] Although Mr Goer gave evidence at Ms Carter's instigation, I found him to be a credible and disinterested witness.

[23] Mr Cowie agrees with Mr Goer's evidence regarding GSE's automatic payment and says that TML received approximately \$38,000.00 by this means. During the investigation meeting he also confirmed with his office manager that TML did invoice GSE for accounting services provided by Ms Carter for April, May and June, and subsequently pay her for that work. However, he points out that this was before he signed a fresh agreement with GSE in July. He reiterated to me that he had instructed Mr Turner in July to explain to Ms Carter that things were to change then. He said his expectation had been that what happened in November (Ms Carter's resignation and direct engagement by GSE) should have happened in July. For her part, Ms Carter stressed that in July she knew nothing of any of this.

[24] With regard to Silver Tiger, Mr Cowie says that TML introduced Ms Carter to them with a view to her providing services to them on an "at risk" basis. He accepts though that the respondent may have invoiced Silver Tiger for the work that she did. Ms Carter says that in all

⁴ Ms Carter told me it was not until later that she learnt that TML had not invoiced GSE until March 2005 for the work she did between July and October 2004.

her dealings with this client she took instructions from Geoff Turner. She said a limited amount of work was done by the two of them initially to "get the client on board". This work was not chargeable and she understood that. After a few days of this, she told Mr Turner that she was not prepared to do more without payment and asked him whether he had a contract in place with the client. He intimated that he did, and on that basis she proceeded with further work for the client.

Determination

[25] It is not in dispute that the services Ms Carter provided to GSE during April, May and June were undertaken as an employee of TML, under instructions from Mr Turner. Ms Carter's position is that there was no change to his instructions during the period July to October 2004. As far as she was aware, the work she did for this client during that time was done pursuant to the employment agreement she had with the respondent.

[26] I have found Ms Carter to be a credible and coherent witness and accept that it was not until October 2004 that Mr Turner gave her any indication that the respondent no longer required her to provide services to GSE on its behalf. Her evidence is consistent with Mr Goer's understanding, with the perception she demonstrates in her email correspondence with Mr Turner, and with the fact that Mr Turner invoiced GSE for the services provided. I conclude that Ms Carter continued during July, August, September and October to provide monthly accounting service to GSE the same basis as previously. In the absence of an instruction to change or cease what she was doing, that work was, as before, done on the respondent's behalf.

[27] I conclude therefore that work performed by Ms Carter for "GSE" and "Silver Tiger" in the period July-October 2004 was performed in her capacity as an employee of the respondent.

(ii) Whether Ms Carter is owed remuneration for her work pursuant to her employment agreement with the respondent.

[28] The respondent's position is that even if Mr Turner did lead Ms Carter to believe she was working for TML when doing the monthly accounts for GSE, TML is not liable. Mr Cowie says that, pursuant to the employment agreement, two preconditions have to be met before the respondent is liable to pay Ms Carter for work she has performed on its behalf. These are that there was a contract in place between the respondent and the client, and that the client has paid the respondent for the services provided. In his September letter to Ms Carter's lawyer Mr Cowie stated: "*I draw to your attention the remuneration stipulation in our agreement with Carolyn that she was to only be paid when TML received remuneration for her services.*"

[29] Mr Cowie says that because there was no accounting contract between TML and GSE after July and because TML was never paid for such services by GSE, it owes Ms Carter nothing for work done for GSE, even if it was done on Mr Turner's instructions as a director of TML. As for Silver Tiger, Mr Cowie said TML did not have a written contract with Silver Tiger for accounting services and did not receive payment for accounting services. In Mr Cowie's August letter to Ms Carter's solicitor he stated that Mr Turner "*agreed the Silver Tiger arrangements with Carolyn after clear instructions from myself. These instructions to Geoff were explicit in relation to the at-risk nature of any work.*"

[30] In making the submission he has, Mr Cowie relies on the following words from the employment agreement: "*Full time Base Salary: 80% of the net revenue, excluding GST, received by TML from financial management assignments contracted to by TML involving the employee.*"

[31] Up to a point, Ms Carter agreed with what Mr Cowie said in relation to the meaning of the agreement. Regarding the first precondition, she acknowledged that some preliminary work performed for prospective clients would not attract payment, and agreed that some of the work she did for Silver Tiger was in this category. Other work, done after she resigned, was on her own behalf. However she says that she also did work for GSE and Silver Tiger on Mr

Turner's instructions and after he had led her to believe that they were the respondent's clients. She told me:

"As TML's employee I did not question TML's administration of its contracts with its clients...I honoured our employment agreement by making myself available to undertake work required at the clients they asked me to work at...I had every reason to trust that they would honour our employment arrangements as much at GSE and Silver Tiger as they had at [previous clients]"

[32] As for the second precondition, she also accepted that this was a high risk business where clients might not always pay, and acknowledged that she was compensated for that risk by potentially high returns (80% of what the respondent billed the client.) However, in relation to the second precondition, she considered it the respondent's responsibility to invoice its clients and to pursue payment vigorously, and felt that it had not done this.

[33] Ms Carter does not assert that she was entitled to a retainer and agrees that payments to her could vary from month to month depending on what work she had done. Ms Carter received her last payslip from the respondent for the pay period ending 17 September 2004. She received gross pay of \$4,000.00, said to be for 21.75 days work at a daily rate of \$183.90. However this appears to have been a nominal daily rate as she did not have either fixed hours or a fixed hourly rate. In fact in most weeks her hours of work were close to the 24% of full time that she had initially agreed to make herself available for.

[34] The same payslip shows \$4,026.26 holiday pay due and year to date earnings of \$22,000.12 gross (which figure excludes the \$15,000.00 lump sum paid direct by GSE.) Ms Carter received no remuneration from the respondent in the months of October or November. As we have seen she gave notice in late October and her employment ended at the end of November.

Determination

[35] I accept that, pursuant to the terms of the employment agreement, payment to Ms Carter was conditional on the respondent having contracted to provide services to the clients concerned and on the client having made payment for those services. Essentially, what the parties entered into was a "commission only" payment regime pursuant to an employment agreement.

[36] I do not accept Mr Cowie's submission that the first condition was not met. Given all the circumstances (including the acceptance by the clients of the services and the subsequent invoicing for those services) I conclude that is more likely than not that Mr Turner entered into oral agreements with these clients for provision of Ms Carter's services. However, I do accept that the respondent did not receive revenue from the work in question, and cannot accept that it failed to adequately pursue payment. As Ms Carter knows, this was a high risk environment and the threat of non-payment was ever present. The second precondition, in my view, has not been met.

[37] However, that is not the end of the matter. Although both Ms Carter and TML appear to have given some consideration to entering into a contract for services, for commercial reasons the respondent opted to offer a contract of employment which Ms Carter accepted. There is no dispute that Ms Carter was an employee and neither party may now contract out of that. Both must accept all its consequences, including the application of the Minimum Wage Act 1983, the Wages Protection Act 1983, and the Holidays Act 2003. The Minimum Wage Act 1983 (section 6) provided at the time in question that all adult employees must receive a minimum of \$9.00 per hour, while the Wages Protection Act provides at section 4 that an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[38] Commission-only structures may give rise to a breach of s.6 of the Minimum Wage Act if commission payments in a particular period fall short of the Minimum Wage. For a period of nine weeks during October and November (up until her employment ceased) Ms Carter received no payment. As she confirmed to me, she worked and/or was available to work, for at

least "24% of full time" or ten hours per week. She is therefore entitled to arrears of wages for 90 hours at \$9.00 per hour, that is, \$810.00.

[39] There is no dispute that holiday pay is owed. Ms Carter is entitled to the sum of \$4,206.26 outstanding at the time of her termination, plus a further eight percent (pursuant to her employment agreement) of the additional arrears awarded today (\$64.80) that is a total of \$4,271.06 holiday pay.

[40] The respondent is therefore ordered to pay to Ms Carter the following sums:

i. Arrears of wages	\$810.00
ii. Holiday pay	\$4,271.06

[41] Ms Carter has also claimed, and is entitled to, interest on both these orders. Clause 11(1) of the second Schedule to the Employment Relations Act 2000 provides that:

"..in any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgement is given, of interest, at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the Authority thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority."

[42] The 90-day bill rate today stands at 7.67%. I order the respondent to pay interest at the rate of 8% on the arrears of wages and holiday pay from the 1 December 2004 until the date of payment to Ms Carter.

Costs

[43] Neither party was represented before me and neither was completely successful. I consider in these circumstances that it is appropriate to let costs lie where they fall.

Y S Oldfield
Member of Employment Relations Authority