

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 49
5418124

BETWEEN CHARLOTTE DALY
 Applicant

A N D HOT WELLNESS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Charlotte Daly in person
 Eve Johnson, Advocate for Respondent

Investigation Meeting: On consideration of the papers

Date of Determination: 13 February 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Charlotte Daly, alleges that she was unjustifiably dismissed on or about 29 April 2013. But the respondent, Hot Wellness Limited (the company), represented by one of the company's directors, Ms Eve Johnson, says that Ms Daly was not an employee; rather, she entered into a verbal contract for services to be provided as a business consultant. Alternatively, the company says that if the Authority determines that Ms Daly was an employee at the material times, she left on her own accord.

Preliminary issue

[2] The outcome of a conference call with Ms Daly and Ms Johnson is that it was agreed that there is a preliminary matter to be determined by the Authority. This is: Was Ms Daly an employee or an independent contractor? While the dispute before the Authority involved a working relationship that occurred at Rotorua, Ms Daly and

Ms Johnson reside at Geraldine; hence it is more practicable for this matter to be determined on the papers. Both parties have provided written submissions and evidence supporting their respective positions, in anticipation of the Authority determining this preliminary matter.

Background

[3] The company, Hot Wellness Limited, operates Go360, a gym located at Rotorua. While the gym is the company's core business, complementing the focus on healthy living and also attached to the gym facility, is a shop: GoRaw. The shop trades in what is commonly called healthy living products.

[4] Ms Daly and Ms Johnson appear to be well acquainted with each other, both living in the South Canterbury town of Geraldine, with mutual family connections. The evidence of Ms Daly is that she had previously worked for Ms Johnson as an office administrator in a business at Geraldine.

[5] In December 2012, Ms Daly was contemplating moving to Australia to seek employment and education opportunities in the holistic health sector. Ms Daly states that following a discussion with Ms Johnson, she was offered a position at Go360 in Rotorua, where she would have the opportunity to work with the other director of the company; Ms Belinda Bennett, a naturopath and holistic health practitioner.

[6] While Ms Daly and Ms Johnson appear to have a more or less common view of an agreement being reached whereby Ms Daly would relocate to Rotorua to work at the GoRaw shop, there is a marked difference in regard to their respective views as to the nature of the working relationship that was entered into.

[7] From the information provided to the Authority it appears that while Ms Johnson reached an understanding with Ms Daly that the latter would move from Geraldine to Rotorua to assist with the operation of the GoRaw shop, it was left for Ms Daly and Ms Bennett (based at Rotorua) to discuss the nature of the work that Ms Daly would be involved in, hours of work, and appropriate payment.

[8] Ms Daly travelled to Rotorua, commencing work at the GoRaw shop on 11 February 2013. Ms Daly states that Ms Bennett informed her that she would be given a three month trial and if everything went well, Ms Daly would be given a full-time position. It also appears that it was agreed between Ms Daly and Ms Bennett that

taking into account the operating hours of the gym, the times for peak sales each day would be from 9:30a.m. to 1:00p.m; then from 5:00p.m. to 7:30p.m. It was also agreed that Ms Daly would be paid \$360.00 per week.

[9] The understanding of the Authority is that the respondent only expected Ms Daly to be present during the above working hours and that she was free to leave the premises otherwise. However, Ms Daly says that the extent of the work she was required to do did not allow her to leave the premises during the day. This proposition is denied by the respondent.

[10] It appears that the contribution of Ms Daly led to an improvement in trading figures for GoRaw and this was acknowledged and apparently appreciated by the company. Consequently, as evidenced, by an email from the Go360 manager, Mr Paul Jeune, dated 24 April 2013, Ms Daly was presented with an employment agreement to peruse. Mr Jeune proposed that the agreement could be signed by both parties on Friday, 26 April 2013.

[11] It seems that Ms Daly took issue with some of the terms of the employment agreement and she expressed her views accordingly to Mr Jeune. According to some notes provided by him, Ms Daly requested a meeting with Ms Bennett, in addition to Mr Jeune being present. As the Authority understands it, Mr Jeune provisionally arranged for a meeting to take place on Monday 29 April 2013, with the intention that Ms Bennett would be present. However, at 9:36a.m. that morning, Ms Daly sent an email to Ms Johnson in which she was most critical of Ms Bennett.

[12] It is unclear exactly what happened from there in regard to Ms Bennett's involvement, but Mr Jeune records that he met with Ms Daly at approximately 12:30p.m. on 29 April 2013. He states that Ms Daly presented a list of "demands" pertaining to the proposed employment agreement; including the provision of a company car¹ and cell phone, in addition to seeking an increase in wages. Mr Jeune states that after about 30 minutes, Ms Daly rejected the offer of full-time employment and she indicated that she intended to terminate her working relationship with the company; citing an "untenable" relationship between her and Ms Bennett. Mr Jeune states that it was then agreed that Ms Daly would finish up at 5:00p.m. that day, but then she later informed that she had an appointment to attend to and would finish at

¹ Ms Daly says that she asked for a company fuel card that had previously been offered by Ms Bennett

3:15p.m. It seems that Ms Daly also alleged that she was owed more than \$1,400 for extra hours that she had worked but had not been paid for.

[13] Mr Jeune informs that he phoned Ms Daly the next day (30 April 2013) at approximately 4:15p.m. An offer was made to her, apparently consistent with a previous discussion with Ms Johnson, that the company would pay up to \$1,000 towards a reputable nutrition course. But this was conditional upon Ms Daly providing “documented proof” of the unpaid hours of work that she was claiming payment for. Mr Jeune records that Ms Daly declined the offer made to her and informed that she would be lodging a formal complaint with the Department of Labour.

[14] Ms Daly has not provided any information pertaining to her departure from the business, apart from informing that she subsequently requested written reasons for her alleged dismissal.

Analysis and conclusions

[15] Under the provisions of s.6 of the Employment Relations Act 2000, when deciding whether (or not) Ms Daly was an employee, the Authority is obliged to consider the real nature of the relationship between her and the company. Also the Authority must consider all relevant matters, including anything that indicates the intentions of the parties.

[16] And finally, the Authority is not to treat as a determining matter any statement that describes the nature of the relationship.

[17] It seems to the Authority that Ms Johnson acted in good faith, as a friend and previous employer of Ms Daly; by giving Ms Daly an opportunity to gain some income, in addition to learning more about the natural health field that she was interested in, including an opportunity to engage in a suitable course of study. However, it seems that the actual nature of the relationship, that is: whether Ms Daly was to be an employee or an independent contractor, was left in the hands of Ms Bennett to discuss with Ms Daly upon the latter’s arrival in Rotorua. This is when, most probably, the exact nature of the relationship became a matter of contention.

[18] Nonetheless the Authority concludes that it is more probable than not that the relationship between Ms Daly and Hot Wellness Limited was that of an employee and employer.

[19] In arriving at this conclusion, the Authority accepts that the initial engagement of Ms Daly was for a trial period of three months, albeit it must be said that it was not a 90 days trial period under section 67A of the Employment Relations Act. From the perspective of the company it appears that the trial period was about ascertaining whether Ms Daly could improve the turnover of the GoRaw shop, which, apparently, she did. Hence a employment agreement was subsequently offered to her.

[20] In arriving at the conclusion that Ms Daly was an employee, I have noted that she was requested to work rostered or set hours each day; albeit Ms Daly says that she needed to work longer hours to carry out her duties, but as previously mentioned, this is disputed by the company.

[21] The Authority also notes that Ms Daly was provided with a business card that designated her as “*Shop Manager*” for the GoRaw Shop & Café. It also appears that Ms Daly was accountable to and effectively under the control of Ms Bennett, and possibly Mr Jeune, although he seems to have only become more involved when the employment agreement was being discussed.

[22] Weighed against the above factors that point to an employment relationship is that Ms Daly presented a tax invoice each week to Go360 for the sum of \$360.00; being, apparently, monies due for 24 hours worked each week at \$15 per hour. But then there is what appears to be a final invoice that has somewhat different entries. That is, the hours of work are shown where they are not on the other invoices, with payment for 31 hours being due: a sum of \$465.00. There are also entries of: “*As roster specified*” and, “*As requested by manager Paul Jeune*” in reference to the hours worked. Just why this last invoice has a different format has not been explained by Ms Daly.

[23] While the tax invoices tend to show, to some extent at least, that Ms Daly may have been in business on her own account, there is no other evidence that she was operating a business. For example, she did not have any business assets such as a business telephone or computer, nor is any evidence of independent tax arrangements, or that she was available to provide services to other businesses, or that she could

manage her hours of work. Nor is there any evidence that points to her having any experience as a “Business Consultant” as referred to by Ms Johnson.

Determination

[24] It has to be said that the circumstances pertaining to the relationship between Ms Daly and Hot Wellness Limited were unusual and confusing and it is difficult to ascertain with any real certainty what the intentions of the parties were. However, the weight of the evidence points towards a conclusion that it is more probable than not, in legal terms, that Ms Daly was in an employment relationship with the company.

[25] This finding means that she is entitled to pursue the claims that she has set out in her statement of problem.

Direction to mediation

[26] Given the evidence currently before the Authority pertaining to this dispute, it is by no means certain what the outcome for either party might be if the Authority is required to determine matters. And this would require an investigation meeting at which the parties would have to be present and appropriate evidence provided, including evidence from Mr Jeune and Ms Bennett. However, the Authority is of the view that further mediation may be of assistance in order to more clearly identify the differences between the parties and to ascertain the strengths and weaknesses of their respective positions.

[27] Therefore, if Ms Daly wishes to continue to pursue her claims, pursuant to s.159 of the Employment Relations Act 2000, the parties are directed to attend further mediation. As both Ms Daly and Ms Johnson currently reside in Geraldine, it seems appropriate that the mediation should take place under the auspices of the Christchurch Mediation Service (Ministry of Business, Innovation and Employment).

[28] The Authority directs that a copy of this determination along with a copy of the statement of problem and statement in reply be forwarded to the Christchurch Mediation Service and it is anticipated that a Support Officer will contact the parties in due course to discuss suitable mediation arrangements. **However, before the above steps are activated, Ms Daly is required to notify the Authority, within 14 days of the date of this determination, of her intentions.**

Costs

[29] As both parties were self-represented, the consideration of costs is not required.

K J Anderson
Member of the Employment Relations Authority