

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 121
5547283

BETWEEN DONALD JEFFERY FALCONER
Applicant

AND TARANAKI PROPERTY
SPECIALISTS LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Cara Gelston, Counsel for Applicant
Shane Herbert, Counsel for Respondent

Investigation Meeting: 15 September 2015 at New Plymouth

Determination: 14 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Falconer claims his former employer, Taranaki Property Specialists Limited (TPSL), unjustifiably disadvantaged him throughout the course of his employment and unjustifiably dismissed him on 24 September 2014. He seeks compensation, lost wages, arrears of wages and costs.

[2] Taranaki Property Specialists Limited (TPSL) says it was never in an employment relationship with Mr Falconer. It says it engaged Mr Falconer as a self-employed provider of information technology (IT) services. It also says that, if Mr Falconer was employed by anyone, it was by Bell Block Rentals Limited (BBRL).

[3] Mr Falconer was one of two directors of BBRL and held one third of the shares in the company. TPSL also held one third of the shareholding and its office manager, Graham Richards, was the other director of BBRL. The third shareholding

was held by the Green Family Trust. Glen Green is a director of Bell Block Realty Limited.

Issues

[4] The sole issue currently for determination is whether Mr Falconer was employed by TPSL.

Relevant background and evidence

[5] Mr Falconer signed an Agreement for Provision of Administrative Services on 20 September 2013 with TPSL, whose Principal and sole director is John Christiansen. Although Mr Falconer referred to this as an “*employment agreement*”, the document, which described him as “*the Contractor*”, strongly suggested a contract for services relationship.

[6] Under the terms of that contract, Mr Falconer supplied IT services to the respondent from time to time on an “*as required*” basis. He was to supply invoices to the respondent which would pay GST in addition to his service rate if he were to be GST-registered. Mr Falconer could decide when he would provide services and he was to manage his own time. He could choose whether to provide his services at TPSL’s premises or at his own premises. He was free to provide similar services to other organisations provided he maintained confidentiality in respect of the respondent’s affairs and there was no conflict of interest.

[7] Amongst the terms of the contract, it was agreed, for the avoidance of doubt, that Mr Falconer was to be completely independent of the company and was not to be considered for any purposes to be an employee of the company, or a joint venturer or partner of the company.

[8] In the course of the investigation meeting Mr Falconer acknowledged that he now realised this was a contract for services relationship, not one of employment.

[9] While undertaking IT work for TPSL Mr Falconer made it known to some of that company's personnel that he operated a rental property company, Active Rental Management Limited (Active Rentals). This led, in the early months of 2014, to Mr Falconer, Mr Christiansen, Mr Richards and Mr Green discussing the possibility of entering into a new business arrangement.

[10] This would entail the formation of a new company to be operated under the Harcourts brand. It would start in Bell Block, with a longer term aim of moving into New Plymouth city rentals. TPSL would not be directly involved in this but would be involved via shareholding. The shareholders would each contribute \$2,000 to the company capital.

[11] The venture was intended to be beneficial to all the parties. Mr Falconer was regarded as having the personal and communication skills to increase the portfolio of properties he already had through Active Rentals. The Harcourts branding would enhance his ability to grow the rental property market in Bell Block. It would also provide him with access to training, support and resourcing from the Harcourts Group. This would allow him to spend less time on administrative and support tasks and more on gaining clients for the new business.

[12] The discussions held between Messrs Falconer, Christiansen, Richards and Green were captured in a memorandum dated 9 April 2014 by Mr Christiansen. Although some changes were made to the initial proposal, including a slightly different shareholder structure, the formation of BBRL was the result of the understanding they had reached in April 2014. It was incorporated on 30 May 2014.

[13] The final paragraph of the 9 April 2014 memorandum, which Mr Christiansen sent to all the parties involved in the discussions, was as follows:

*DJ will be the company's only employee (legal requirement).
Commission rate 33% of all PM and letting income. Car allowance.
Coy to pay phone (Harcourts plan). Some KPIs to adhere to in terms
of new PMs. One per week?*

[14] It was Mr Falconer's evidence that, although the intention had been at the outset that he would be an employee of BBRL, that was not how the arrangement panned out. He said that, although he was a director, he had no decision-making ability with regard to the property management business. He was instructed, in particular by Mr Richards, what work he was to undertake and when he was to undertake it. He said he was required to report to Mr Richards on a frequent basis.

[15] Mr Falconer said he worked from the Bell Block Realty Limited premises but was often required to attend TPSL's New Plymouth office and that Mr Richards' expectation was for him to work until 5pm daily. Mr Richards denied that he had control of Mr Falconer or that he set expectations of his hours of work. He was

adamant that the expectation was for Mr Falconer to work from the Bell Block premises of Bell Block Realty Limited where he was accommodated. There was no need or requirement for him to work in TPSL's New Plymouth office.

[16] In Mr Richard's view Mr Falconer was the pivot of the BBRL venture. He reiterated that the understanding from the outset of the new company's formation was that he (Mr Falconer) would promote and grow the business of that new venture. He acknowledged Mr Falconer frequently joined him for coffee at a café in New Plymouth in the mornings but said that was Mr Falconer's choice and provided a good way of keeping in touch.

[17] Mr Falconer said he worked in excess of 40 hours per week but, although the parties had agreed he would be paid on the basis of a 40 hour week, in reality he was paid only for 10 hours a week. He was aware the company had only \$9,000 in capital but, nonetheless, believed he was entitled to receive \$1,000 per week as remuneration from the commencement of his employment.

[18] Neither Mr Christiansen nor Mr Richards had any recollection of a discussion over Mr Falconer being paid on the basis of a 40 hour a week. In their respective recollections, he was to be paid a small amount weekly in the first instance while he built up BBRL's property management portfolio, after which the arrangement recorded in the 9 April 2014 memorandum (commission of 33%) would apply.

[19] Mr Falconer said he often raised this issue with Mr Richards and also mentioned it to Mr Green but nothing was done. He also said he frequently asked for an employment agreement but was never provided with one. Under cross examination Mr Falconer agreed he could have written his own employment agreement as he was a Director of BBRL. He said he thought it would be unethical to do that and he did not know how to write an employment agreement. Mr Falconer provided documentary evidence which, in his view, established that he was employed by TPSL. These included letters containing his signature as Property Manager that were written under the Harcourts banner and TPSL name.

[20] The documents also included Mr Falconer's business card containing a photograph of himself under the Harcourts banner with the name Taranaki Property Specialists Limited directly underneath that. The business card also contained the words Team Green Property Management. The email address on the business card

was dj@harcourts.co.nz. Another letter provided by Mr Falconer under the Harcourts Taranaki Property Specialists Limited banner contained his signature as Property Manager, Harcourts Taranaki Property Specialists Limited, Bell Block office.

[21] Other evidence, however, shows Mr Falconer's signature in emails dating from July 2014 being as Director/Property Manager, Bell Block Rentals Limited.

The Law and its application to the Relationship

[22] Section 6 of the Employment Relations Act 2000 concerns the meaning of *employee* and provides, at section 6(2), that:

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.

[23] In order to determine the real nature of the relationship the Authority must consider all relevant matters, including any matters that indicate the intention of the parties. However, it must not treat as a determining matter any statement by the persons that describe the nature of their relationship.

[24] The leading case in determining the real nature of the relationship is that of the Supreme Court judgment in *Bryson v Three Foot Six Ltd (No 2)*¹. In that case the court held (at page 386) that *all relevant matters* included the written and oral terms of the contract between the parties and the way it operated in practice. It required the court or Authority to *have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test)*.

Intention of the parties

[25] In this instance there was no employment agreement. It was Mr Richards' evidence that, initially, when discussions were taking place in early 2014, it was envisaged that Mr Falconer would be an independent contractor. However, after taking advice it was decided he would be an employee of BBRL. That evidence is supported by the final paragraph of Mr Christiansen's memo of 9 April 2014, cited

¹ [2005] ERNZ, 372

above, which refers to the "*Legal requirement*" of Mr Falconer being an employee of the proposed property rental company.

[26] Mr Falconer agreed that Mr Christiansen's memorandum of 9 April 2014 set out what was discussed. He acknowledged the intention had been that he would be the proposed company's employee but says in reality that is not what happened.

[27] It is clear that, at least at the time BBRL was formed, there was a common intention that Mr Falconer would be an employee of that company, as well as being a Director and shareholder.

Control

[28] Mr Falconer asserts that control was exercised over his activities by TPSL which, through Mr Richards, instructed him in what duties he was to undertake and where he was to work from. Factors put forward in support of this claim to be an employee of TPSL included his attendance at that company's staff events and its Wednesday morning "*bus run*"; and his regular attendance at TPSL's weekly team meeting. He also cited his frequent morning coffee attendances with Mr Richards.

[29] Mr Richards' evidence was that Mr Falconer did not report to him or anyone else in TPSL. He said Mr Falconer was the sole charge Property Manager for BBRL and was relied on to carry out that function and make a success of the new business. Mr Richards said he offered mentoring and support to Mr Falconer and that was the purpose of many of their meetings.

[30] Mr Christiansen gave evidence about the obligations that came with operating under the Harcourts banner. Those obligations applied to all property managers operating under license from TPSL. None of those property managers were employees of TPSL. Mr Christiansen said Mr Falconer was the only one who had claimed that status. He said there was no requirement for Mr Falconer to attend TPSL's staff meetings or staff events, but it was open to him to do so, as it was for other non-TPSL personnel.

[31] I am not persuaded by Mr Falconer's evidence. He was a relative newcomer to the property business and appeared, from his evidence, to be both eager and ambitious. It is likely he wanted to gain as much knowledge and information as he could from Mr Richards and others in TPSL who had the wealth of knowledge and

experience he lacked. For that reason he accepted mentoring from Mr Richards and is likely to have taken seriously any advice proffered by Mr Richards and deferred to him. That does not convince me that Mr Richards or TPSL was in a position of control over Mr Falconer.

[32] I find he was not required to attend the premises of TPSL with the regularity he claimed, and nor do I find his attendance at TPSL events, or his joining Mr Richards for morning coffee, to have been compulsory or to indicate a degree of control over his activities.

Integration

[33] The 9 April 2014 memorandum recording the agreement of Mr Falconer, Mr Christiansen, Mr Richards and Mr Green to establish a new company included an agreement that the company would be "Harcourts Branded". Mr Christiansen gave evidence of what this entailed.

[34] He said TPSL operates under a franchise licence from Harcourts Group Limited, which is the master-franchisor of the Harcourts brand and business systems. Under its franchise licence TPSL sells real estate under the Harcourts brand. It is also authorised to grant sub-licences for the use of that brand within its designated territory. It was Mr Christiansen's evidence that the terms of any licence or sub-licence relationship included requirements that all publications, marketing, advertising and communications must show TPSL as franchisee and as authority for the use of the Harcourts brand.

[35] Mr Christiansen listed four companies, including BBRL, to which TPSL had granted licences to use the Harcourts brand for conducting their property management businesses. It was his evidence that none of the staff of any of those companies were employed by TPSL although all had marketing material citing both Harcourts and TPSL.

[36] He said that TPSL also provided small accounting services to BBRL to support the new company. That was confirmed by the accountant, Jarran Colman, in his evidence. Mr Colman said he provided such services to a number of other entities that are associated with TPSL.

[37] I am satisfied from the evidence presented to me, both in written and oral form, that the references to Harcourts and to TPSL on Mr Falconer's business card and marketing material are not evidence of his integration within either of those companies. I find those references reflect the business model of a franchise and licensing arrangement.

[38] I am also not persuaded that Mr Falconer's attendance at functions, activities and courses arranged by TPSL (or Harcourts) denote his integration into TPSL. I view them as part and parcel of the sublicensing arrangement which he, and the other three gentlemen referred to above, agreed would form part of the business model of the new company they were discussing in April 2014, which they registered as Bell Block Rentals Limited the following month.

Conclusion

[39] Mr Falconer's initial relationship with TPSL was that of a contractor providing various IT services to TPSL and the companies with which it had licensing arrangements. That was conceded by Mr Falconer in the course of the Authority's investigation.

[40] That relationship led to discussions with TPSL personnel about a new business venture. I have found that the common intention of the parties in relation to that new venture was that Mr Falconer would, in addition to being a Director and shareholder, be the sole employee of the company they agreed to establish to pursue their common business interests.

[41] I have found that TPSL did not exercise control over Mr Falconer other than by ensuring he met the obligations, as well as benefitting from the advantages, of operating under the Harcourts brand as provided by sub-licence from TPSL. I have also found he was not integrated into the business of TPSL.

Determination

[42] For the reasons given above I find that Mr Falconer was not employed by Taranaki Property Specialists Limited. Accordingly he is unable to progress his claims for personal grievances against the respondent.

Costs

[43] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority