

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 230
5314211**

BETWEEN ROSLYN FITZGERALD
 Applicant

AND WESTERN AFTER HOURS
 VETERINARY CLINIC LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: David Rooke, Counsel for Applicant
 Allan Fursdon, Advocate for Respondent

Investigation Meeting: 13 April 2011 at Auckland

Submissions received: 13 April 2011 from Applicant
 13 April 2011 from Respondent

Determination: 31 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Roslyn Fitzgerald, claims that she has a personal grievance under s103A of the Employment Relations Act 2000 (“the Act”), in that she was unjustifiably dismissed by Western After Hours Veterinary Clinic Limited (“WAHVC”) at the end of April 2010. Ms Fitzgerald claims that the dismissal was unjustifiable both substantively and procedurally.

[2] WAHVC denies it unjustifiably dismissed Ms Fitzgerald on the basis that Ms Fitzgerald was not an employee but an independent contractor during the period she was working for WAHVC.

Issues

[3] The issues for determination are:

- whether Ms Fitzgerald was an employee or an independent contractor during the period she was working for WAHVC
- if it is determined that Ms Fitzgerald was an employee, was she unjustifiably dismissed by WAHVC

Preliminary Note

[4] I note that whilst the Applicant stated that WAHVC was previously known as Western Springs After Hours Veterinary Clinic, it has come to my attention that the correct entitling of the Respondent may be Western Springs After Hours Veterinary Clinic Limited.

Background Facts

[5] WAHVC is one of a number of ‘after hours’ veterinary clinics operating in Auckland, owned and operated by a combination of owners and directors of day clinics in Auckland. Manakau After Hours Veterinary Clinic Limited (“MAHVC”) is another clinic in this group.

[6] WAHVC and MAHVC are veterinary practices which operate solely outside normally recognised business hours. WAHVC does not provide the normal services associated with a standard veterinary practice, such as spaying or vaccinations, except in emergency or urgent situations. Clients are casual and not ‘pre-booked’, with any follow up services being carried out by the client’s primary pet care provider.

[7] Until 2008 Ms Fitzgerald had been a shareholder in MAHVC by virtue of the shareholding held in the name of Pet Pals Limited, a company jointly owned by Ms Fitzgerald and her husband at that time. Ms Fitzgerald was a director of MAHVC from 24 June 1997 until 25 March 2010, and towards the latter part of 2008, also the Manager of MAHVC.

[8] Mr Alistair Kirkby was also a shareholder in MAHVC and had met Ms Fitzgerald at Annual General Meetings and Committee Meetings. Mr Kirkby was a shareholder in 7 veterinary clinics, including WAHVC; he was also a director of WAHVC and with effect from December 2007, became the Manager of WAHVC.

[9] In 2008 Ms Fitzgerald, a qualified Veterinarian, worked at WAHVC for a period of approximately 3 months, working 2 days per month. During this period of time Ms Fitzgerald also worked shifts at other veterinary clinics.

[10] At the beginning of December 2009 Ms Fitzgerald, who had been working in Hastings during 2009, contacted Mr Kirkby, explained that she would be in Auckland over the Christmas period of 2009/2010, and enquired if there was any work available at WAHVC.

[11] Mr Kirkby said that there were 2 locum shifts available over this period, which he offered to Ms Fitzgerald. Ms Fitzgerald, having accepted the offer, had been rostered for these shifts. Ms Fitzgerald also carried out shifts at MAHVC during this time.

[12] On or about the beginning of 2010 Ms Gina Voglar, a Veterinarian who worked at both WAHVC and MAHVC, was in the process of negotiating for the purchase of a kennel/cattery business and had advised Mr Kirkby that if the sale proceeded, she would no longer be available to work at WAHVC.

[13] On 13 January 2010 Ms Fitzgerald, who had returned to Hastings following her completion of the rostered 'Christmas' shifts, emailed Mr Kirkby and enquired if there would be any future work available for her at WAHVC. Ms Fitzgerald explained that she had obtained some work at MAHVC, and had further advised in an email on 13 January 2010 that she expected to be available for any future work from March 2010 onwards.

[14] Mr Kirkby said that Ms Fitzgerald had worked some allocated shifts at WAHVC in March and April 2010, but explained that unbeknown to him, Ms Fitzgerald had worked additional shifts which had been allocated to other Vets. It was only when he had become aware of the payments being made to Ms Fitzgerald that he realised she had been working these additional shifts during March and April 2010.

[15] At the end of April 2010 a new roster was issued for May 2010. With the roster was posted a direction that no shifts were to substituted or arranged without Mr Kirkby's knowledge. Mr Kirkby explained that he had been concerned that the fact that shifts were being altered without his knowledge might result in WAHVC not having a Vet available on some nights.

[16] Ms Fitzgerald had not been allocated any rosters on the May roster.

Employment and Payment of the Vets

[17] The majority of the Veterinarians ("Vets") who work at the 'after hours' clinics also work in other veterinary clinics on a regular basis. No employment agreements were issued to the Vets, the terms under which they were working being agreed orally, but not confirmed in writing.

[18] Mr Kirkby explained that the Vets, including Ms Fitzgerald, submitted GST invoices for the work they had carried out, being paid either a minimum fee, or a commission fee, based on the services charged and for which WAHVC had been paid.

[19] Mr Kirkby said that prior to 2010 the practice in respect to administering the process had been poor in that, because some of the Vets could be slow in submitting their invoices, they were paid in advance and the GST invoice obtained later. Mr Kirkby said all the Vets, including Ms Fitzgerald, with the exception of one Vet who had been on a working holiday from the UK, had been paid on this basis. However the nursing staff employed in both MAHVC and WAHVC were employees and paid a salary with PAYE deducted.

Determination

Was Ms Fitzgerald was an employee or an independent contractor during the period she was working for WAHVC?

[20] Ms Fitzgerald gave evidence to the effect that she was an employee when working for WAHVC and was therefore able to bring a personal grievance under s 103 (1)(b) of the Employment Relations Act 2000 (“the Act”).

[21] In deciding whether Ms Fitzgerald was employed by WAHVC as an employee, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

1. In deciding ... 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.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider all relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[22] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the 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), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[23] In this case there are no written terms and conditions of employment on which to establish the contractual nature of the relationship. In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*³ to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[24] Ms Fitzgerald contended that an employment relationship was intended at the time she commenced working at WAHVC. Mr Kirkby stated that, in accordance with the industry practice, the Vets working in MAHVC and WAHVC were regarded as ‘locums’, who were considered to be independent contractors.

[25] Ms Fitzgerald had been a shareholder and director of Pet Pals Limited from the date of its incorporation in March 1995 until July 2008. Ms Fitzgerald explained that the Vets

¹ [2005] 1 ERNZ 372

² [1993] 1 ERNZ 695

³ [1995] 2 ERNZ 414 (WEC64/95)

working at Pet Pals Limited were considered to be employees and had been given employment agreements.

[26] Ms Fitzgerald had become a shareholder and director of MAHVC, a business which was run on the same basis as WAHVC, and had managed it for a period of time. Ms Fitzgerald said that at that time none of the Vets working at MAHVC had employment agreements, but she had taken no steps to change this situation, which as the Manager she ought to have done had she believed the Vets to have been employees. I find this omission significant given her knowledge of the practice of issuing employment agreements to the Vets working at Pet Pals Limited. I further deem it to be indicative of the fact that Ms Fitzgerald considered the Vets at MAHVC to have the status of independent contractors.

[27] Further, Ms Fitzgerald had made no request for a written employment agreement when she had approached Mr Kirkby in connection with the possibility of her working at WAHVC, even though she was aware of the requirements for employment agreements to be issued to those vets considered to be employees, as exemplified by her experience at Pet Pals Limited and her observations as regards the practices at MAHVC.

[28] I find it more likely than not that had Ms Fitzgerald requested an employment agreement, this would have been discussed in detail with Mr Kirkby: Ms Voglar had been employed on an employee basis from 1997 until 2002 when she had elected to become self-employed, the UK Vet had been employed on an employee basis, and the nursing staff were regarded and treated as employees. The fact that Ms Fitzgerald did not make such a request I consider to be attributable to her having understood the nature of the contractual relationship between her and WAHVC to have been that of an independent contractor.

[29] I consider that Ms Fitzgerald was aware of the difference between an employee and an independent contractor in light of the evidence and her business experience.

[30] I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether Ms Fitzgerald was working on her own account.

Control and Integration

[31] Ms Fitzgerald stated that she was subject to the control of WAHVC in respect of the provision of services. Specifically Ms Fitzgerald said that she was:

- expected to wear the WAHVC uniform and to use the equipment and tools that WAHVC provided;
- to treat the animals with pharmaceuticals provided by WAHVC;
- to provide a personal veterinary service to patients on an agreed number of days in accordance with a roster;
- to invoice clients and to enter their data on WAHVC's computer system 'Vet Manager'; and
- to follow the WAHVC rules, policies and procedures

[32] Ms Voglar, who described herself as self-employed with effect from 2002, said that the Vets were not supervised, and although WAHVC supplied a gown for the Vets, they were able to wear their own gowns and were also allowed to use their own equipment. Ms Voglar explained that she wore her own gown, and she provided some of her own equipment and medication. Ms Voglar said that she would be reimbursed by WAHVC for the medication she supplied.

[33] Mr Kirkby said that the Vets volunteered to cover the shifts. Over a period of time it became accepted that certain Vets preferred to work specific nights and if they were unable to do so, another Vet would cover the shift. It was apparent from the evidence that the Vets organised cover between themselves, and if they were unable to do so, Mr Kirkby would then ask for a volunteer.

[34] This is supported by an email dated 18 February 2010 sent by Mr Kirkby to a number of the Vets which states: *“Fiona has asked me to find someone to do a regular Weds night at WS, could you please indicate you[r] interest or otherwise please.”*

[35] Far from being rostered to provide a service on an agreed number of days, the evidence of Mr Kirkby was that he had been unaware that Ms Fitzgerald had been working some of the rostered shifts in 2010 until he was presented with a request for payment. It was Ms Fitzgerald who determined which shifts she would work by liaising with the other Vets, and in particular with Ms Voglar.

[36] This evidence is supported by Ms Fitzgerald's own evidence that the May roster was accompanied by a directive that shifts were not to be substituted without Mr Kirkby's knowledge.

[37] I do not find that WAHVC's expectation that the Vets enter client data on 'Vet Manager' or to follow WAHVC's rules, policies and procedures to be determinative of an employment relationship, as I believe these are requirements which it would be reasonable for a business to expect to expect an independent contractor providing services to the business at the premises of the business to comply.

[38] In summary, I do not find evidence that Ms Fitzgerald was subject to the control of WAHVC in the provision of services, or that her position was integral to the operation at WAHVC.

The Fundamental Test

[39] WAHVC did not calculate or pay PAYE or the ACC levy on behalf of Ms Fitzgerald whilst she was providing services at WAHVC. Ms Fitzgerald submitted GST invoices in respect of her hours worked and was paid accordingly. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*" Mr Kirkby admitted that there had been flaws in how the system operated prior to 2010 since payment to the Vets sometimes pre-dated the submission of their GST invoice, however this has no bearing on their status as independent contractors.

[40] Ms Voglar said that she, having originally been employed at MAHVC on an employee basis, had been advised by the other Vets to become GST registered as this would give her the advantage of being able to claim various expenses against her income, and she had duly proceeded to appoint an accountant and register for GST, and became self-employed with effect from 2002..

[41] Ms Fitzgerald was an experienced business woman who, in addition to her shareholding and director interests in Pet Pals Limited and MAHVC, was also a director and

⁴ [2010] NZEMPC 1

shareholder of Roslyn Fitzgerald Holdings Limited, a company incorporated in February 2009.

[42] Ms Fitzgerald had professional accountancy advice on the conduct of her business and personal affairs. Ms Fitzgerald had supplied both MAHVC and WAHVC with a GST number. In May 2010, in the course of discussions about the payment due to Ms Fitzgerald and the correct submissions of the invoices in respect of these payments, Ms Fitzgerald wrote in an email to Mr Kirkby dated 4 May 2010:

My GST status

After your inquiry about my GST, I spoke to my accountant, Ian Masson. He asks me to inform you to email him if you have any queries.

...

He has pointed out that you are indeed technically correct in that I should be using my Roslyn Fitzgerald Holdings Ltd – GST 101725820 and not Pet Pals LT GST. He will comfort you in the knowledge that as I ½ own Pet Pal – all would be “washed up” in the final tax so you need not have concerns.

The email clearly confirms that Ms Fitzgerald was invoicing both MAHVC and WAHVC utilising a GST number, something which is not available to an employee, and that Mr Kirkby was aware that Ms Fitzgerald was an independent contractor.

[43] I find that there is sufficient evidence to indicate that Ms Fitzgerald was in business on her own account.

[44] I determine that Ms Fitzgerald was an independent contractor during the period of her providing services to WAHVC.

Was Ms Fitzgerald unjustifiably dismissed by WAHVC?

[45] Having determined that Ms Fitzgerald was an independent contractor and not an employee, this effectively disposes of the matter.

Costs

[46] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the

date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority