IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 34
3024112

	BETWEEN	LEEANNE FOOTE Applicant
	A N D	PROGRESSIVE REALTY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Dean Kilpatrick, Advocate for respondent
Investigation Meeting:	22 November 2018 at Christchurch
Submissions and further information received:	29, 30 November, 4 & 19 December 2018 from Applicant 30 November & 14 December 2018 from Respondent
Date of Determination:	24 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Following the determination of the Authority on 3 May 2018[1] that Ms Foote was an employee of the respondent from 23 November 2013, Ms Foote claimed payment of various sums that she says are due to her from the respondent, and arising out of her employment.

[2] The respondent has admitted that it does owe Ms Foote certain sums but resists payment of other sums. The respondent also counterclaims against Ms Foote

[1] [2018] NZERA Christchurch 60

for repayment of the sum of $30,002.23, being the total sum of GST payments it says it made to her when it believed she was an independent contractor.

[3] Following the determination of the Authority, the parties were invited to attempt to resolve these outstanding issues through mediation, but this has not been possible.

Background

[4] Ms Foote worked for the respondent, a real estate agency business, as a Property Manager. Her duties included procuring listings for properties for rent, securing tenants, seeking approval from landlords for work to be carried out, inspecting let premises and providing written reports and pursuing tenants for arrears of rent.

[5] Under the terms of her employment she was entitled to payment of certain commissions.

The payments which the respondent concedes are owed to Ms Foote

[6] By way of an open letter to Ms Foote dated 17 October 2018, Mr Kilpatrick wrote on behalf of the respondent stating that it was prepared to accept and resolve Ms Foote's claims in respect of four matters:

(a) A claim for reimbursement of costs incurred in getting keys cut in the sum of $110;

(b) The sum of $300 in respect of commissions due on referring the management of two properties;

(c) Commissions due to Ms Foote in respect of two periods, 1st to 28th February 2017 and 1st to 23rd March 2017, totalling the gross sum of $3,400; and

(d) Holiday pay in the gross sum of $2,769.60.

[7] In Mr Kilpatrick's letter to Ms Foote he stated that the only condition of the offer is that Ms Foote confirmed in writing to the Authority that those aspects of her claim were resolved and withdrawn.

[8] It appears that Ms Foote did not make that confirmation in writing and that the sums have therefore not been paid to Ms Foote. However, given that these were concessions made by the respondent I formally record in the determination that these sums are due to Ms Foote and I shall incorporate them into the orders at the end of this determination.

[9] Ms Foote dropped five heads of claim during the course of the investigation. For the avoidance of doubt, I record these as follows:

(a) A claim in the sum of $1,200 in respect of an unpaid referral fee for the sale of a property in Woolston, Christchurch.

(b) A claim in the sum of $2,000, being the difference in base salary between which Ms Foote was entitled to up to 31 July 2016 and the base salary she was entitled to after that date.

(c) ACC levies that Ms Foote says that she had to pay when she was being treated as an independent contractor.

(d) The sum of $11,000 tax that Ms Foote said she had to pay when she was an independent contractor.

(e) Compensation for losses that Ms Foote says were incurred due to incorrect information being provided by the respondent about her earnings for the purposes of her daughter's student allowance assessment. Although this was discussed during the investigation meeting, it was established that it was Ms Foote's daughter who had incurred the loss, not Ms Foote. On that basis, Ms Foote agreed the Authority had no jurisdiction to determine the issue.

Matters to be determined

[10] The following matters remain to be determined by the Authority:

(a) A claim for $23,082.30 commission which Ms Foote asserts is due to her in respect of letting fees between 1 October 2014 and 1 August 2016.

(b) A claim in respect of Kiwisaver contributions that the employer did not make between 1 February 2014 and 31 July 2016.

(c) The respondent's counterclaim against Ms Foote in the sum of $30,002.23.

The claim for $23,082.30 commission

[11] According to Ms Foote, on the last business day of September 2014, Mr Joe Mullins, a director and shareholder of the respondent, casually said to all property managers that, for the first business day in October 2014, they would no longer be eligible to receive letting fees, and that somebody else was to do the letting. Ms Foote says that, up to that point, she had been receiving 45% of letting fees, less GST, received into the office from all tenants at the time a tenant rented a property which she managed.

[12] The respondent provided evidence from Mr Joe Mullins, and his son, Mr James Mullins, the Business Development Manager for the respondent. Mr James Mullins explained that, after the Christchurch earthquake, properties began to get tougher to rent and property managers were busy doing other core roles such as chasing arrears, inspections and arranging maintenance. This meant that they only had time to arrange one viewing a week. He said that, in his opinion, leasing is a different role, being more sales oriented, than the other aspects of property management and that to be a successful agent in the leasing process, they had to be very outgoing, sales driven and have a sense of urgency.

[13] The respondent therefore made a decision around this period to change the way that leasings were made by introducing a software package allowing tenants to book viewings online at any time. This change also required a single leasing agent to be recruited who would be responsible for all leasings. That aspect of the property manager's role would therefore be taken away from them. They would then be able to focus on actually managing the properties in their portfolios.

[14] Both Mr James Mullins and Mr Joe Mullins said that the change in structure was discussed at length with the property managers and administration teams. They say that the feedback they received was generally positive, and that the only concerns raised were around potential loss of earnings for property managers, and about who would have the final say on tenant selection.

[15] The Mullins' say that one of the property managers, Shelley Scott, volunteered to become leasing manager. This was also discussed with the team and there were no

objections about her taking on the role. The properties that Ms Scott had been managing were distributed amongst the team so that the income levels remained the same, or close to it, but the leasing role was removed from their duties. Mr Joe Mullins says that he was confident that, with the time saved by not having to do viewings, the property managers would have been able to have managed their properties more effectively and their income would not have been affected.

[16] Mr James Mullins says that these changes were discussed with the team both formally at meetings and informally in an open plan office and that there were no disputes. He says that everybody was positive about the changes so long as their income remained the same.

[17] Mr James Mullins says that, on some occasions after the change, property managers were given letting fees when they directly let properties such as, for example, when Ms Scott was away or where student properties were re-tenanted through friends already living there, so that they dealt directly with the property manager responsible for the property. Mr James Mullins said that there were some examples of this in Ms Foote's case resulting in her being paid the letting fee in respect of such properties.

[18] Mr Joe Mullins says that, between October 2014 to the end of July 2016, there were 118 properties let from Ms Foote's portfolio but that, even if she were entitled to letting fees at 45% of the total fees under the contract, she has over-estimated her claim so that she would only be entitled to $23,082.30 (gross). Ms Foote concedes that that would be the correct figure if she succeeds in her claim.

[19] Ms Foote denied that she had ever agreed either to the 45% letting fee being taken off her or to Ms Scott doing all viewings as leasing manager. She says that it was just implemented. She also says that she tried to raise concerns about the issue but that Mr Joe Mullins, and his wife, Sue Mullins, both told her that it was of no concern to them. Mr Mullins denied this. When it was put to her in cross examination that she carried on working despite the change, she responded by asking rhetorically, but reasonably in my view, whether she was supposed to have picketed the company, or lose her job.

[20] Evidence was also heard from Ms Jill Andrews who also used to be a property manager employed at the time of the change. She also said that there had been no

agreement with the property managers in respect of the change, and that there had been no choice but to accept it.

[21] Ms Foote also denies that she received 20 properties from Ms Scott's portfolio, and says that she actually only received 10, of which two were unlettable as they were being repaired, and were then sold. She also says that her income over the period after the change fluctuated as she gained and lost lettings, but that the 45% letting fee was a bonus which enabled her to earn over and above what the contract allowed for the properties she managed. She therefore does not accept that the change enabled her to keep her income unchanged.

Discussion

[22] I am treating this claim as a breach of contract. I do not believe it can be treated as a claim for unlawful deductions from wages under the Wages Protection Act 1983 as Ms Foote did not perform the work (leasing properties to tenants) which she had previously carried out and for which she had been paid the commission. However, she was deprived of the opportunity to carry out leasing work, which had previously enabled her to earn the 45% commission.

[23] When I consider the evidence of both parties, I believe that, whilst the respondent discussed with the property managers, including Ms Foote, the implementation of the software and the appointment of a leasing agent (or how else would Ms Scott have known to come forward to be a volunteer for that role) the cessation of the payment of a 45% letting commission was presented as a *fait accompli* and that there was no formal agreement by Ms Foote to the change.

[24] That commission was an integral part of Ms Foote's remuneration, and so was an essential term of the agreement between her and the respondent. By the respondent unilaterally withdrawing it, albeit after discussion, but without agreement, the respondent repudiated the contract between it and Ms Foote. Ms Foote chose not to cancel the contract but put up with the breach and its consequences. That was her right, as is made clear by the use of the word "may" in s 36 of the Contract and Commercial Law Act 2017, which reflects the common law position that a party to a contract may cancel it if another party repudiates it by making clear that it does not intend to perform its obligations under the contract.

[25] Section 38 of the Contract and Commercial Law Act provides that a party is not entitled to cancel the contract if, with full knowledge of the repudiation, misrepresentation, or breach, the party has affirmed the contract. A party affirms, if, with full knowledge of the facts, he or she makes it clear by works or acts, or even by silence, that he or she refuses to accept the breach as a discharge of the contract[2]. *Burrows, Finn and Todd* also cites a passage from *Jansen v Whangamata Homes Ltd*[3], in which Randerson J said:

> It must be shown that the electing party made a firm and settled choice and does not intend to go back on it. Putting it another way, the electing party must be shown to have committed irrevocably to one of two inconsistent courses of action.

[26] I do not believe that, because Ms Foote chose to continue to work, that decision represents a firm and settled choice to just accept the repudiation. She was in a vulnerable position in the sense that she needed to continue to work to earn a living. Having tried to address the issue with the respondent unsuccessfully, she had little practical choice but to continue to work, other than to sue her employer or to walk out. Neither choice is a palatable one for an employee. She was also being treated as an independent contractor, and so had no ostensible access to the personal grievance route. Therefore, I do not accept that Ms Foote affirmed the breach, thereby disentitling her to damages.

[27] Ms Foote is entitled to be restored to the position she would have been in had the breach of contract not occurred. However, the law does not allow a claimant to recover more than has actually been lost, so that if the breach leads to benefits that would otherwise not have been made, those benefits have to be taken into account[4]. The respondent asserts that the change caused Ms Foote no loss because of an increase in income which flowed from her being able to spend more time managing more properties.

[28] Therefore, in theory at least, it is necessary to calculate what commission Ms Foote would have earned had she still been entitled to letting commissions, and set that against any additional earnings she gained as a result of the change. However, it is not possible to make this comparison accurately in practice because, whilst the

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[2] Burrows, Finn and Todd *Law of Contract in New Zealand* (5th ed, Lexis Nexis, Wellington 2016) at 696.
[3] HC Hamilton CIV-2003-419-1511, 29 November 2004
[4] Burrows, Finn and Todd, at 792.

parties agree on what the gross commission earned would have been by reference to the properties allocated to Ms Foote[5], it is not easy to differentiate between, on the one hand, properties gained and extra income earned as a result of the change and, on the other hand, properties that would have been gained and income earned in any event. This is because the number of properties in a property manager's portfolio fluctuates from month to month.

[29] Ms Foote says that she did gain properties after the unilateral change, but that this was as a result of her hard work and skills. However, that does not mean that I can ignore gains made due to her own efforts, as she was under a duty to mitigate her loss in any event. This is summarised in Burrows, Finn and Todd at 841:

> The law does not allow a plaintiff to recover damages to compensate for loss which would not have been suffered if he or she had taken reasonable steps to mitigate the loss.

[30] Therefore, it is legitimate to compare what commission earnings Ms Foote was making prior to the change (including let fees) with the commission earnings she was making after the change (without the let fees), no matter how the earnings were made.

[31] One methodology is to compare the average earnings each month up to 30 September 2014 with the average earnings each month between 1 October 2014 and 31 July 2016. This approach is based upon the assumption that there were no other changes in the material period that would have significantly altered the number of properties being managed, and the income being made from those properties. As Ms Foote stated, she worked hard managing properties both before and after the change, and Mr James Mullins continued both before and after the change to allocate to Ms Foote new properties to manage. I believe that this is the most pragmatic approach to ascertain whether Ms Foote suffered any loss or not.

[32] The respondent supplied figures showing the commission that it says was paid to Ms Foote on a monthly basis throughout her employment. In assessing the average monthly income earned by Ms Foote before the change as against the average income she earned after the change, she earned an average of $353 gross a month less after the change compared to what she earned on average before the change. That equates to a total loss of $7,744 gross.

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[5] $23,082.30

[33] Ms Foote has adopted a different approach in calculating her loss. She has compared her monthly commission over 22 months by comparing the January earnings for 2014 with the January earnings for 2015 and for 2016, and so on, up to August 2016. I believe that this is potentially a more accurate approach because it takes into account the seasonality of the business and it directly compares the same months year by year.

[34] Ms Foote's approach equates to an overall loss $11,935.23 gross. This includes $2,937.48 which has been calculated by reference to the payment received in August 2014, and the fact that no payment appears to have been received at all in August 2016 (which relates to commission earned in July 2016). Having checked the respondent's data, it does appear that no commission was paid to Ms Foote in relation to July 2016. I therefore accept that the sum of $2,937.48 needs to be included in the calculation of loss.

[35] In summary, I accept that the best assessment of the loss suffered by Ms Foote arising from the unilateral withdrawal of letting fee commission is $11,935.23. This is the sum of damages that the respondent must pay to Ms Foote.

Employer's KiwiSsaver contributions between 1 February 2014 and 31 July 2016

[36] The respondent concedes that Ms Foote is entitled to receive an award representing what would have been the employer's contribution to Ms Foote's KiwiSaver account for the period when she was treated as an independent contractor provided that she was a member of a KiwiSaver scheme at the time and provided she was not on a contributions holiday.

[37] Ms Foote states that she was a member of a scheme which she contributed to both before and after she had been engaged by the respondent purportedly as a contractor, but that she ceased to contribute, except for small amounts occasionally, expressly because she was not treated as an employer by the respondent.

[38] Ms Foote has proven that she was enrolled in KiwiSaver at the time of her employment. However, the respondent says that Ms Foote has not proven that she made any contributions herself to KiwiSaver between December 2013 and August 2016. The respondent relies on ss 101A and 101C of the KiwiSaver Act 2006. Section 101A provides that an employer must pay an employer contribution for an

employee to the extent that the employee meets the requirements in s 101C for a period to which a payment of salary or wages relates.

[39] Section 101C of the KiwiSaver Act provides:

> **101C Employee's requirements**
> For the purposes of section 101A(1), the requirements are that the employee—
> (a) is paid salary or wages from which the employer deducts or is required to deduct an amount for the employee's KiwiSaver scheme or complying superannuation fund; and
> (b) is aged 18 or over; and
> (c) is not entitled to withdraw an amount from a fund or scheme under clause 4(3) of the KiwiSaver scheme rules (which relates to lock-in of funds) or a rule the same as that clause; and
> (d) is not a defined benefit scheme member.

[40] Mr Kilpatrick submits that, as Ms Foote has not provided evidence that she was contributing to her KiwiSaver account during the relevant time, the employer is not obliged in law to make KiwiSaver contributions. I understand that this submission refers to the requirement that the employee is paid salary or wages from which the employer deducts or is required to deduct an amount for the employee's KiwiSaver scheme, which suggests that, if the employee is on a contributions holiday, the employer is not obliged to make compulsory employer contributions. This interpretation is supported by the information provided by the IRD's KiwiSaver website[6].

[41] Ms Foote has provided evidence that she was enrolled in a KiwiSaver Scheme from 2012. She has not been able to provide evidence that she made contributions during the material time, as the records are no longer available she says. Ms Foote did state in an email to the Authority that she spent time with her bank seeking the information but that "I have however been advised I did in fact make voluntary payments during the time I cannot obtain records for." It is not clear how the bank was able to confirm that without any records.

[42] However, upon considering Mr Kilpatrick's submission, the difficulty with it is that the respondent is arguing that no employee's contributions were made from Ms Foote's salary or wages (thereby removing their obligation pursuant to s 101C of the KiwiSaver Act) during a time when she was not paid salary or wages in any event because she was treated as an independent contractor. Ms Foote's claim for

[6] https://www.kiwisaver.govt.nz/already/contributions/employers

KiwiSaver contributions stems solely from her having been treated incorrectly as an independent contractor. Therefore, it is not just, in my view, to deprive her of her right to employer's KiwiSaver contributions on the basis of that incorrect characterisation of her as an independent contractor.

[43] Therefore, I accept Ms Foote's claim. It is possible that she will need to account for employee's contributions, as if she was an employee, but I believe that is a matter between her, the Commissioner of Inland Revenue and her KiwiSaver provider.

[44] The parties are to seek to agree the amount of this employer's KiwiSaver contribution that is owing to Ms Foote, taking into account her total eligible earnings during the material period from 23 November 2013 and 31 July 2016, including any eligible earnings that have been awarded in this determination. If they are unable to agree the amount within 21 days of the date of this determination, Ms Foote may apply for a determination from the Authority.

The counterclaim in respect of GST

[45] The respondent claims that it included a GST element in the payments made to Ms Foote when she was treated as an independent contractor. During the investigation meeting held by the Authority into the status of Ms Foote, she said that the IRD had agreed that she was not liable to pay GST. For this reason, the respondent is claiming a refund of $30,002.23 in respect of what it claims was an overpayment to her.

[46] In his evidence, Mr Mullins states that Ms Foote was overpaid the GST element and that the company has claimed GST in respect of what has been paid to her. He says that the respondent will need to recover that payment in order to address it correctly with the IRD. However, first, it is not clear that the respondent has actually incurred any loss in making these payments, given that it will have set off the GST paid to Ms Foote as an input credit against GST which it has had to account to the Inland Revenue for, in respect of its provision of goods and services.

[47] The respondent also relies upon s 6 of the Wages Protection Act 1983 to seek to recover the payments of GST to Ms Foote. However, an 'overpayment' in this section is defined as "any wages paid to a worker in respect of a recoverable period".

I do not accept that the GST elements paid to Ms Foote can be characterised as "wages", as they were, specifically, GST payments. It is immaterial that Ms Foote was later assessed by the IRD as not being liable to pay GST.

[48] The respondent says that Ms Foote was taxed on the GST element, as if it were income but, again, that does not make the payments wages, as that was a taxation assessment, not an employment law assessment.

[49] In addition, I do not believe that the Authority had the jurisdiction to order Ms Foote to repay this sum, given that GST is not a matter that is charged by an employee to an employer. It is not, therefore, an employment relationship problem, which the Act provides "includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship". Whilst the Authority found that Ms Foote was an employee, and not an independent contractor, GST can only be levied on the proceeds of a sale of goods or services.

[50] For all of these reasons, I decline to award the sum sought against Ms Foote to the respondent. I believe that the best approach for the parties to adopt is to discuss the matter with the IRD and seek direction from that department.

Orders

[51] I order the respondent to pay to Ms Foote the following within 14 days of the date of this determination (unless the sums at (a) to (d) have already been paid):

(a) The sum of $110 in respect of reimbursement of costs incurred in getting keys cut;

(b) The gross sum of $300 in respect of commissions due on referring the management of two properties;

(c) The gross sum of $3,400 in respect of commissions due to Ms Foote for the periods 1st to 28th February 2017 and 1st to 23rd March 2017; and

(d) Holiday pay in the gross sum of $2,769.60.

(e) The gross sum of $11,935.23 in respect of commission.

(f) Further holiday pay calculated at 8% on the commission in the sum of $954.82.

[52] The respondent is to pay to Ms Foote the sum agreed with her in respect of the Employers' KiwiSaver contributions within 14 days of such agreement being reached, subject to Ms Foote's right to apply to the Authority for a determination of the amount if no agreement is reached within 21 days of the date of this determination.

Costs

[53] In the determination disposing of the preliminary matters, I reserved costs but indicated that, at that stage, I was not minded to award costs to either party given that both were partly unsuccessful. I note that Mr Kilpatrick states in his submissions in the current matter that the respondent seeks a contribution towards its costs, presumably in this current matter only.

[54] Whilst the respondent was mostly unsuccessful in this current matter, Mr Kilpatrick refers in his submissions to Ms Foote withdrawing some claims on the day of the investigation meeting, and implies that that caused costs to be incurred by the respondent unnecessarily, as it had prepared to address those claims.

[55] I direct the parties to seek to agree how costs are to be dealt with. If they are unable to reach agreement within 21 days of the date of this determination, any application for a contribution towards legal costs incurred must be served and lodged within a further 14 days, describing the amount sought, and the basis for that. Any reply must be served and lodged within a further 14 days after that. The Authority would then determine costs on the papers.

David Appleton
Member of the Employment Relations Authority