

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Lexia Marshall (Applicant)
AND Hansen & Berry Limited (Respondent)
REPRESENTATIVES David Burton, Counsel for Applicant
Anthony Russell, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 27 April 2005
DATE OF DETERMINATION 17 May 2005

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] The applicant, Mrs Marshall contends that she was, prior to the severance of the relationship with the respondent, an employee. The respondent says that at the applicant's insistence it reluctantly agreed to retain Mrs Marshall as an agent paid on commission.

[2] The parties have tasked the Authority with deciding whether Mrs Marshall was employed under a contract of service or a contract for services.

A brief history

[3] The applicant was originally employed as a sales representative with responsibility of the South Island territories. In early 1995 the respondent says the applicant requested that she change to a commission only method of remuneration while continuing to represent the company in the south. The respondent, while apparently not threatened with such an outcome, acceded as it was afraid it would lose a very able sales woman.

[4] Mrs Marshall was employed during the currency of the Employment Contracts Act 1991, and as she had not requested a written contract, no document was prepared nor signed by the parties.

[5] In the letter to the applicant dated 12 April 1995 the company confirmed several important changes to the applicants entitlements under the changed arrangements. These were;

- That the applicant would surrender her salary of \$28,000.00 per annum; and
- Relinquish her right to a company car; and
- Relinquish her entitlement to annual leave; and
- Her entitlement to special leave;

in exchange for a commission of 10% of the value of her sales completed for the respondent.

[6] The letter also stated *Hansen and Berry are prepared to offer you your current position remunerated by a 10% commission*. It also reserved the companies right to review the situation should its sales be adversely affected by the applicant's other activities.

[7] The applicant was the only person paid on a commission and by and large the arrangement seems to have operated to the mutual benefit of both parties until the company saw its South Island sales declining. As a result of an opportunity to change its representation in the south resulting from the restructuring of an unassociated company, the respondent decided to sever its relationship with the applicant and engage another person on a salaried basis.

[8] In a letter to the applicant, the respondent explained the situation and, since the change was to occur promptly, undertook to pay Mrs Marshall one-twelfth of her average commission calculated over the preceding years sales.

[9] In short, the applicant notified her alleged personal grievance, the respondent did not pay the commission and the matter proceeded to the Authority. It was agreed between counsel for the parties that the Authority determine the preliminary issue and not address the substantive matter at this time.

The investigation meeting

[10] In a genuinely friendly meeting the parties put their respective views on the issues. I heard from Mrs Marshall on her own account, and from Mr Jackson, the financial controller for the respondent in person. I also heard from Mr Hansen and Mr Fair, the sales manager at the time of the change in remuneration arrangements, by telephone. All had provided written statements which assisted considerably in the investigation. I found all the witnesses to be open and honest in their dealings and their giving of evidence.

[11] The Authority also had the opportunity to study some of the applicant's records prepared by her accountant for taxation purposes. Regrettably, Mrs Marshall was unable to locate all of these documents over the relevant period. However, what was provided was of assistance to the Authority.

[12] It was of concern to me that when I asked the applicant to convince me that the records as presented did not represent those of the person in business on her own account, Mrs Marshall replied that she left such details to her husband and her accountant. I formed the view that here was a woman who was a very able sales person but who was less focused on the details that came to the heart of this matter.

Analysis and Discussion

[13] There are a range of tests the Authority needs to apply when determining this issue. Initially on the basis of the economic reality test it is clear to the Authority that the applicant is a person in business on her own account. While Mrs Marshall contributes to the company's sales, she also accepts the benefit or loses that result to her personally from her own sales activity on behalf of the respondent.

[14] In respect of the control test, from the applicant's evidence when questioned, it is clear that when the Hansen and Berry sales were seasonally slow, she deployed her time in securing sales for other principals in the shoe and aluminium market. This clearly indicates that the respondent, under

the arrangement, was unable to control the work done by Mrs Marshall on a day to day basis. In short she could deploy her time in her best interests as she saw fit.

[15] The next test that the Authority needs to consider is the integration test and having surrendered all of the benefits concomitant on being an employee in order to maximise her financial benefits solely based on her sales performance, the applicant took on her own risk, substituting that for the company's risk. She was, after May 1995, not integrated into the company's business but essentially operating on her own behalf.

[16] A key plank of the applicant's case sits on the phrase in the respondent's April letter which states "your current position...". More astute drafting might have referred to retaining Mrs Marshall's right to sell on the company's behalf but it does not alter the reality of the change of status.

[17] The company, in entering into an agreement with Mrs Marshall, might have been better to have formalised the change in her status in an agency agreement signed by each party. In spite of this, I am of the view that the respondent clearly delineated the changed status of Mrs Marshall. It could have been more clearly detailed, but was sufficiently set out as I see the matter.

Determination

[18] On the basis of the evidence before the Authority, and in particular the business records prepared by the applicant's accountant I find on the balance of probability that Mrs Marshall was a sole trader in business on her own account. One has only to look at the accounts to accept that she received income not only to other agencies but from other business activities.

[19] I also find that in negotiating altered terms of remuneration with Hansen and Berry was to enable her to deploy her sales and entrepreneurial skills to her best advantage, and in doing so changed her contract from one of service to one of for service.

[20] The Authority has no jurisdiction in resolving the issues between the parties. If Mrs Marshall wishes to enforce the undertaking given in Mr Hansen's letter of 31 July 2002, an alternative forum is an appropriate place.

Costs

[21] Given the Authority's determination in this matter and given that the investigation took less than a day, I think it appropriate that costs should follow the event. In order to avoid further costs to the parties I award costs to the respondent in the sum of \$1,200.00.

Paul Montgomery
Member of Employment Relations Authority