

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Peter John McLean (Applicant)
AND Buy West Realty Limited (Respondent)
REPRESENTATIVES Simon Judd, Counsel for Applicant
Ian Davidson, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 12 May 2005
DATE OF DETERMINATION 29 August 2005

DETERMINATION OF THE AUTHORITY

The issue for determination is whether the applicant, Mr. Peter McLean, is an employee or a contractor. Mr. McLean worked for the respondent, Buy West Realty Limited, as Branch Manager.

The respondent maintains that Mr. McLean was a contractor in that he falls within the definition of a salesperson in the Real Estate Agents 1976. The contract signed by the parties is clearly a contract for services and Mr. McLean invoiced the company. However, Mr. McLean says that if the real nature of the relationship is examined then he will be found to be an employee.

The respondent says that the provisions of the Real Estate Agents Act 1976 clearly govern the relationship and its nature. Section 2 defines a salesperson as follows:

...a person who, being employed or engaged (whether under a contract of service or a contract for services) by a real estate agent, works for the agent in selling or otherwise disposing of land or businesses (either with or without any interest in the land), purchasing or otherwise acquiring land or businesses (either with or without any interest in the land) or leasing or letting land and-

a) includes an officer of a licensee company who is not eligible to apply for or obtain their licence in his or her own right; but

b) does not include a licensee or an employee whose work is primarily and predominantly clerical.

A "licence" is "a real estate agents licence granted under this Act". Section 17 sets out the eligibility criteria for licenses. Section 51A sets out the employment status of salespersons:

(1) *This section applies (or, as the case may be, shall be deemed to have*

applied) to a salesperson and a real estate agent at any time if—

- (a) Before that time and before the commencement of the *Real Estate Agents Amendment Act 1992*, they agreed, whether expressly or by implication, that the relationship between them at that time should be that of employer and independent contractor; or
 - (b) Before that time and on or after the commencement of the *Real Estate Agents Amendment Act 1992*, they agree expressly that the relationship between them at that time should be that of employer and independent contractor.
- (2) At a time before the 19th day of July 1990 when this section is deemed to have applied to a salesperson and a real estate agent, the salesperson shall for all purposes (other than the purposes of the *Income Tax Act 1976* and the *Goods and Services Tax Act 1985*) be deemed to have been engaged by the agent under a contract for services.
- (3) At a time after the 31st day of March 1991 and before the 22nd day of August 1991 when this section is deemed to have applied to a salesperson and a real estate agent, the salesperson shall for the purposes of the *Income Tax Act 1976* be deemed to have been engaged by the agent under a contract for services.
- (4) At a time after the 21st day of August 1991 and before the 1st day of April 1992 when this section applies (or is deemed to have applied) to a salesperson and a real estate agent, the salesperson shall for all purposes (other than the purposes of the *Goods and Services Tax Act 1985*) be deemed to be (or to have been) engaged by the agent under a contract for services.
- (5) At a time after the 31st day of March 1992 when this section applies to a salesperson and a real estate agent, the salesperson shall for all purposes be deemed to be engaged by the agent under a contract for services.
- (6) Notwithstanding subsections (2) to (5) of this section, a real estate agent is liable for the acts and omissions of a salesperson engaged under a contract for services in the same manner, and to the same extent, as for the acts and omissions of a salesperson engaged under a contract of service.]

Section 54 (2) reads:

- (2) Every branch office of a real estate agent (as specified in the agent's licence) shall be under the effective control of a person approved by the Board, in accordance with sections 54B to 54D of this Act, as a branch manager.

Section 2 has a definition of “Branch Manager”:

...a person approved by the Board under section 54 (2) of this Act to be in effective control of a branch office.

A branch manager must, with the exception of someone who is a branch manager for a stock and station agent licensee (s.54C (d)), hold a certificate of approval issued under s.46 of the Act in order to be able to act as a salesperson.

The applicant says that, therefore, although a branch manager must hold a salesperson’s certificate, a branch manager does not need to be a salesperson. Mr. Judd said that if Parliament had intended s51A to apply to branch managers it would have said so expressly.

The Act also has a definition of an “Officer”:

“Officer”, in relation to a licensee company, means every director, manager, or secretary of the company who, on behalf and in the name of the company, carries on the company's business as a real estate agent; and includes any person, however designated, who is responsible for the management of the company and any person who is responsible for the management of any branch of the company, or (in relation to any company that carries on any other business in addition to its business as a real estate agent) the person responsible for the management of the company's real estate agency business:

Mr. Davidson argued that as Mr. McLean was a branch manager and the definition of officer included a person who was a branch manager that, pursuant to the definition of a salesperson, Mr. McLean was deemed to be a salesperson. This is contingent upon Mr. McLean falling within that part of the definition of a salesperson which “Includes an officer of a licensee company who is not eligible to apply for or obtain a licence in his or her own right”. I was not given any evidence that Mr. McLean was not eligible to apply for or obtain a licence in his own right. He does not fall within the definition of salesperson.

Given that there are separate definitions of “salesperson” and “branch manager” I accept Mr. Judd’s submission that these are separate positions and that a branch manager does not need to act as a salesperson, albeit needing to hold a salesperson’s certificate. However, I do not accept that the work Mr. McLean did was clerical; it was clearly managerial.

I have considered whether a branch manager who also sells or disposes of land or businesses is therefore deemed to be a salesperson. I think in those circumstances it is highly arguable that he does, despite the fact that there are separate definitions for “salesperson” and “branch manager”.

I find that Mr. McLean falls within the definition of a salesperson and his contract for services must stand.

However, if I am wrong about that, an assessment of the work done based on the relevant tests follows.

Tests to Assess Employment Status

Pursuant to s. 6 I need to consider “the real nature of the relationship” and not treat the form of contract entered into as determinative of the relationship.

Mr. McLean did not hire or fire staff, he was required to report to regularly, he had performance criteria and He was not prohibited from doing other work provided it did not conflict with Ray White. He personally sold real estate for commission and could therefore make a profit using his skills.

He had the ability to assign with consent and could work his own hours. Mr. McLean said he had to be there to open and close but it is clear that how he ran the branch and whether or not he spent the whole day or part of the day in the office was up to him. There were no set hours in his contract. His client contact was not controlled although a minimum target was set against his retainer. He participated in a bonus scheme and received commission for his own listings and reported monthly on a formal basis.

He was registered for GST and claimed his car and phone as business expenses. He was in business on his own account. He could expand the business and was encouraged to do so and could affect his earnings through his own efforts. He was not limited by the respondent but he needed the umbrella of a real estate brand in order to operate. This does not differ from franchise situations.

The day to day running was his business; he was to motivate the sales team and deal with complaints. He could manage the salespeople for profit share and therefore could influence the amount of income received. How he did it was up to him. Mr. Smith, the principal officer of Ray White (Real Estate) Limited and Mr. Voordouw said a branch manager could influence 90% of the business

Mr. McLean had a trading entity and was registered for GST and his accounts were prepared by his accountant.

He was to hold weekly sales meetings with sales staff and manage sales efforts. How he did that was up to him. Mr. Voordouw said he rarely gave him direct instructions unless one was requested, had monthly meetings but rarely visited the New Lynn office.

In addition to a retainer of \$4,000 per month he received 20% of branch monthly profit and he received 70% of the commission on his own listings or sales and received a total commission of \$45,392.28 including GST.

There was no indication that he sought or was paid annual leave or for working statutory holidays. Nor was there evidence that he had sought or been granted sick leave.

Intention

The intention in this case was clear. The contract expressly states that Mr. McLean is to be a contractor. Although Mr. Voordouw said that branch managers were employed as independent contractors for tax purposes I accept Mr. Davidson's submission that the contract was not a sham. Mr. Voordouw and Mr. Smith also said it was industry practice to employ branch managers as contractors, although I am aware of instances where that has not been the case.

Control

This is not a decisive factor but one to be weighed with the others. In some minor respects Mr. McLean was under the control of the respondent but there was a concomitant ability on Mr. McLean's part to control how and when he worked which had a direct impact on his earning ability. The relative lack of supervision and control points to a contractor relationship.

Integration

This assesses the extent to which Mr. McLean was "part and parcel of the organisation": Bank Voor Handel en Scheepvaart NV v Slatford [1952] 2 All ER 956 per Denning LJ.

Mr. McLean must operate under the aegis of a real estate business and to that extent he is "part and parcel" of the business. It is a position that is statutorily required for the operation of a branch office

Fundamental test

In Market Investigations Ltd v Minister of Social Security [1968] 3 All ER 732 Cooke J said at p.737:

The observations of Lord Wright, of Denning LJ and of the judges in the Supreme Court in the USA suggest that the fundamental test to be applied is this: 'Is the person who has

engaged himself to perform these services performing them as a person in business on his own account?'

Mr. McLean provided some of the equipment and claimed tax rebates. He was registered for GST, he neither claimed nor received annual, statutory or sick pay and he could benefit financially from his endeavours.

On balance, Mr. McLean was employed on a contract for services.

Costs

The matter of costs was reserved. Should the parties be unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority