

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Heather Miller (Applicant)

AND Michael Percy Investments Limited t/a Field Maple (Respondent)

REPRESENTATIVES Philip C Butler, Advocate for Applicant
J Scott Fairclough, Counsel for Respondent

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 10 May 2005
12 May 2005

DATE OF DETERMINATION 16 June 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] I issued a determination dated 26 May 2005 dealing with the preliminary issue of whether an employment relationship existed between the applicant (Ms Miller) and the respondent, Michael Percy. That determination is now recalled and replaced with this determination.

[2] In a notice of direction dated 14 April 2005, I advised the parties that I would conduct an investigation meeting into the preliminary issue of whether an employment relationship existed or not and issue a determination on that point alone before proceeding, if required, to deal with the substantive issues between the parties.

A History of the Relationship

[3] Michael Percy Investments Limited entered into a contractual relationship in about 1999 with a company called Cirpac Limited. Ms Miller and her husband were both shareholders of Cirpac and its predecessor in title.

[4] Through Cirpac Ms Miller provided contractual services to Michael Percy and these services were paid for on invoice from Cirpac to Michael Percy.

[5] These contractual arrangements continued, it seems, for over two years until negotiations in respect to a possible employment relationship between Ms Miller and Michael Percy commenced towards the end of calendar 2003.

[6] While it is not necessary for me to determine issues as between Michael Percy and other entities which are plainly in the nature of a contractual rather than an employment nature, it is none the less relevant to note that Ms Miller and Michael Percy had an earlier relationship prior to the relationship that is the subject of this determination.

Ms Miller's position

[7] Ms Miller argued that there was an employment relationship which had been agreed to in discussions between the parties in late 2003 and which was actually confirmed by a memorandum which Ms Miller prepared herself dated 30 October 2003.

[8] That memorandum contains the following paragraph:

To confirm our conversation earlier in the month with regard to my coming on board as the sales manager for New Zealand, I will be responsible for managing all New Zealand sales and will work with you on some of the bigger clients. I will have two sales indent trips plus two stock trips per annum around the North and South Islands. All travelling expenses will be reimbursed and I will have a company credit card plus a reimbursement account for small cash expenses. I will have a company vehicle – a later model Landcruiser has been agreed upon. A cellphone will be provided and all business related calls covered. A base salary of \$30,000 plus a commission of 5% on all company indent and stock sales within New Zealand has been agreed with annual reviews. Annual leave has been agreed of four weeks plus the option of taking leave without pay during quiet periods. Sick leave of five days, available after six months of service will be provided if necessary.

[9] Ms Miller's position is that that paragraph and the words which follow, in which she indicates that she will come back to Michael Percy on her return from a trip and they can discuss *where we are at and what to do next* constitute Ms Miller's understanding of the agreement which she says has already been reached.

[10] Ms Miller points to a letter from Michael Percy dated 26 November 2004 which Ms Miller says confirms her view that there was employment relationship agreed to.

[11] In particular, Ms Miller refers to the following paragraphs of the Michael Percy letter:

The agreed terms negotiated by Heather Miller, Letitia Kinney and myself prior to the offer and acceptance of a contract in February 2004 were as follows.

That a 12-month sales contract would begin on the date of acceptance under the following terms.

1) Base remuneration would be \$30,000 paid on a fortnightly basis into your nominated account.

2) A further bonus of 5% commission would be payable on invoiced sales once an agreed target of \$350,000 of sales had been achieved in a calendar year, and payable at the conclusion of that year.

It was also discussed at the time that Michael Percy may be prepared to make a payment in advance in October of 2004 if cash flow allowed.

3) That all sales related costs would be reimbursed to CirPac.

4) That Michael Percy would supply a car and cell phone for the purposes of generating sales.

A number of smaller considerations were agreed to by all and from our point of view a contact has been offered and accepted in good faith.

[12] Ms Miller then goes on to say that she actually commenced her employment on 16 February 2004 but on and from that date she believed that she was accepting employment on the basis of an

agreement reached at the end of the previous year and variously referred to in her memorandum of 30 October 2003 and Michael Percy's letter of 26 November 2004.

[13] When she started work in February 2004, Ms Miller's evidence was that she got the appropriate income tax form from the Inland Revenue Department which she completed and provided to Michael Percy's office. Further, she indicated that she created a wages book and created initial entries in relation to her employment in that wages book.

[14] Her evidence then was that Robyn Anderson, who was a contractor providing some administrative services to Michael Percy, then took over those basic duties.

[15] Robyn Anderson's evidence was that she had started her contractual role with Michael Percy in mid-March of 2004 and that her tasks included doing the debtors ledger and a variety of other administrative functions.

[16] Robyn Anderson said that she picked up the responsibility for keeping the PAYE relating to Ms Miller's work in the wages book at some point but she cannot remember when.

[17] Her evidence was that she took up this responsibility at the request of Ms Miller and she confirmed that the relevant wages book had been provided by Ms Miller and that she simply recorded in that book the gross amount paid to Ms Miller together with a rough calculation of the PAYE.

[18] When pressed, Ms Anderson thought that she may have taken up this new responsibility some time in April 2004 but she seemed genuinely uncertain. She was however quite clear that she never brought the wages book to the attention of either of the principals of Michael Percy (Michael Percy or Letitia Kinney) and that the wages book that she saw related exclusively to Ms Miller and not to any other person.

[19] Ms Miller acknowledges and accepts that after this initial period where, in her terms, an employment relationship had been negotiated and agreed upon and then performed, there was then dispute about the payment of commission but the essence of the understanding between the parties was there, had been agreed upon, was documented and was relied upon by the parties.

[20] Further, Ms Miller says that she was paid from the point at which set up the wages book, as if she were an employee with Michael Percy retaining PAYE sums in respect to each and every net payment to Ms Miller.

[21] Those retained PAYE payments have never been accounted for to the Inland Revenue Department nor have they been paid over to Ms Miller so they are effectively held on trust by Michael Percy pending a determination of the nature of the relationship between that firm and Ms Miller.

Michael Percy's submissions

[22] Michael Percy accepts that it desired an employment relationship with Ms Miller but denies that any such relationship was ever consummated.

[23] Michael Percy says that there were negotiations when Ms Miller said there were, but that there was never a concluded agreement, because there were always fundamental terms that remained in dispute. For instance, Michael Percy acknowledges that there were discussions in September and October 2003 but says that those discussions only every resulted in an offer being put by Michael Percy which as far as it understood the position, had never been accepted by Ms Miller.

[24] Critically, Michael Percy indicated that it had not received a copy of Ms Miller's memorandum of 30 October 2003 until May 2004 although that date is disputed by Ms Miller who seemed to accept that Michael Percy may not have been able to open the original version of the 30 October memorandum (it was attached to an email when sent at first instance) but Ms Miller was sure that she had provided Michael Percy with a fresh copy of the memorandum in about December 2003.

[25] Michael Percy explains the 26 November letter by saying that it regarded the terms and conditions set out in that letter as being its offer but that it was not clear to it that that offer had been accepted.

[26] Of course, at this date, the performance of the agreement between the parties had already commenced and Ms Miller would say that by turning up for duty on 16 February 2004 she was committing herself to commencing an employment relationship with Michael Percy so that any doubts which may have existed in the mind of Michael Percy ought to have been dispelled by her behaviour on and from 16 February.

[27] Michael Percy maintained throughout the investigation meeting that while he desired to have an employment relationship with Ms Miller that did not come to pass on a continuing basis because there were always terms of the employment relationship that were not agreed.

[28] Michael Percy also maintained that the parties had agreed that in the absence of a concluded arrangement in respect to an employment relationship, the independent contractual relationship was to continue and that this is in fact what happened.

[29] Michael Percy considered that there were a number of points in time at which the employer thought there was a deal on an employment relationship but on each of these occasions Ms Miller indicated that she was unhappy with some proposed term so there was never actually a meeting of the minds.

[30] The respondent acknowledged that they had not made PAYE payments in respect to Ms Miller's employment and the reason for this was precisely because Michael Percy did not consider there was a concluded employment agreement and until there was it would be improper to try to as it were "cement" that fact by making PAYE payments to the Inland Revenue Department.

Determination

[31] This a classic case of the parties talking past each other. Plainly they both desired the same thing, namely an employment relationship, but they do not seem to have actively and definitively engaged with each other in order to conclude all the terms of such an arrangement.

[32] Worse than that, both parties seem to have developed a mindset that their understanding of the nature of the relationship is the correct one and they have behaved accordingly. For her part, Ms Miller has behaved since 16 February 2004 as if she were employed on terms and conditions of employment that were negotiated between her and Michael Percy in September and October of the previous year.

[33] Notwithstanding the fact that she said in her evidence that she found out in May 2004 that PAYE was not being paid to the Inland Revenue Department, she says she still continued to believe that she was an employee even after that date presumably on the footing that she felt that the obligation to meet PAYE was on her employer and not on her.

[34] Further, when subsequent to the events considered in this determination the relationship between Michael Percy and Ms Miller was terminated, Ms Miller seeks to have the Authority

review the nature of the termination of the relationship on the footing that it is indeed an employment relationship. That, of course, is the significance of this present determination.

[35] For its part, Michael Percy has consistently behaved as if the relationship were intended to be an employment one but that the parties had not quite got there yet. Michael Percy's behaviour suggests an enthusiasm for an employment relationship but a conviction that that relationship has not yet been agreed to by the parties.

[36] Further, in believing that the parties had agreed to continue a contractual relationship in the absence of an employment relationship being agreed to, Michael Percy continued to treat Ms Miller, in his mind at least, as if she were a contractor and it was on that footing that Michael Percy terminated the relationship with Ms Miller rather on the basis that Ms Miller was in truth an employee.

[37] I confess to seeing the matter as reasonably finely balanced but have reach the conclusion that there is indeed an employment relationship here.

[38] The factors which ultimately weigh with me in preferring an employment relationship to a contractual relationship are as follows:

- Ms Miller's documenting of the proposed arrangement in her memorandum of 30 October 2003.
- Michael Percy's letter of 26 November 2004 and in particular the following sentence from that letter: "A number of smaller considerations were agreed to by all and from our point of view a contract has been offered and accepted in good faith".
- Ms Miller's commencing on the 16 February 2004 and promptly completing the appropriate Inland Revenue Department form for employment and setting up a wages book to document that employment.

[39] While all these factors taken together suggest an employment relationship rather than a contractual relationship, none, it seems to me, is determinative on its own because of course the fundamental reality is that an employment relationship is by its very nature bilateral and the belief by one party that they are in an employment relationship must of necessity be communicated to the other and agreed to by the other.

[40] In that context, I have chosen to rely in making my decision particularly on the sentence that I quoted from Michael Percy's letter of 26 November 2004 to Ms Miller. In that letter, Michael Percy sets out a number of elements of the employment relationship which he refers to as *the agreed terms negotiated by Heather Miller, Letitia Kenney and myself prior to the offer and acceptance of a contract in February 2004*

[41] It seems to me that the structure of Michael Percy's letter defies any explanation other than the one which is the plainest, namely that he is writing about a concluded employment relationship negotiation, the performance of which commenced in February of 2004. In my opinion, Ms Miller consummated that understanding by presenting herself for work on 16 February 2004 with a mindset that she was from there on employed on the terms and conditions negotiated between her and Michael Percy the previous year.

[42] Michael Percy used the phrase *offer and acceptance* or variants of it twice in the passage that I am relying upon, once in the introductory paragraph which refers to the agreed terms having been negotiated by the parties, and once in the final sentence which I also have quoted where Michael Percy uses these words: *a contract has been offered and accepted in good faith*.

[43] In my opinion, in writing those words and the words preceding them, referring to the terms and conditions of the employment, and indicating that they followed on from negotiations which had taken place, and contemplated an employment relationship which started in February, Michael Percy indicated an intention to be bound on and from February 2004 and in fact became bound as a consequence of Ms Miller's attendance on and from 16 February and her behaviour in assisting to create an employment relationship.

[44] I find then that there is an employment relationship between Ms Miller and Michael Percy which commenced on and from 16 February 2004 and continued from that point until subsequently being terminated in early 2005.

[45] It follows that PAYE is due and owing on the employment and Michael Percy is directed to attend to this as a matter of urgency and to provide evidence of having done so to Ms Miller's representative.

[46] Costs are reserved.

James Crichton
Member of Employment Relations Authority