

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 36  
5509448

BETWEEN JULIE MOORE-JONES  
Applicant  
AND ARIKI NEW ZEALAND LIMITED  
Respondent

Member of Authority: G J Wood  
Representatives: Q Haines for Applicant  
R Gibson for Respondent  
Investigation Meeting: 21 January 2015 at Wellington  
Submissions Received: By 2 February 2015  
Determination: 10 April 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Julie Moore-Jones, claims that she became an employee of Ariki New Zealand Limited (Ariki) after originally commencing work as a contractor under a contract for services. She claims that some 18 months later Ariki wrongly sought to reclaim a significant sum of remuneration it says was overpaid to her. Following discussions, the result of which was that she was expected to sign a new contract for services, which also contained a formula for the repayment of the alleged overpayments, she resigned and has claimed constructive dismissal.

[2] In addition to denying Ms Moore-Jones' claims Ariki has, in the alternative, counterclaimed for the \$11,872.01 it considers she was overpaid.

**Issues**

[3] The issues for determination are:

- (a) Was the real nature of the relationship between the parties was one of employee and employer;
- (b) If so, was Ms Moore-Jones unjustifiably constructively dismissed;
- (c) If so, what remedies is she entitled to;
- (d) What moneys, if any, should Ms Moore-Jones pay to Ariki if there have been overpayments?

**Factual discussion**

[4] Ariki is a jewellery manufacturer owned and operated by Mr Dennis Baird and his wife, Barbara. It sells its products in New Zealand and internationally. It utilised the services of three sales representatives for making sales in New Zealand. Two of those sales representatives (i.e. for the South Island and Central and Upper North Island) are full time positions under contracts of employment. The third position, for the Lower North Island (formally titled Sales Representative/Merchandiser), is a part time position that has traditionally been done on a commission only basis under a contract for services.

[5] The Lower North Island job was advertised in 2011 as involving approximately five days per month and suiting someone already having an established portfolio with a compatible brand in this area. Despite Ms Moore-Jones' claims that she was forced to do work such as merchandising, which she did not expect of a sales representative, the fact is that the job was advertised as a sales representative/merchandiser and the job responsibilities in the advertisement clearly included merchandising and dealing with returns and credits, as well as promotional work.

[6] Ms Moore-Jones was successful in her application for the position and both parties entered into what both agreed, at that time, was a contract for services, i.e.

under a commission arrangement that did not involve her becoming an employee. The following are the other key terms agreed to by the parties:

- That it would be approximately 25% of a full time role;
- That 12% commission would be paid on existing accounts (said to be around \$100,000 per annum), with that sum to be paid on the basis of \$1,000 per month in advance on commission;
- That commission of 15% on new business would be paid;
- Monthly payments to Ms Moore-Jones of \$100 for telephone and parking allowance;
- A travel allowance of \$3,600 per annum, payable at \$300 per month.

[7] I accept Mrs Baird's evidence that the \$1,000 per month was commission paid in advance, at Ms Moore-Jones' request, so that her payments would be smoothed out, but that the \$100,000 was simply an estimate of the sales that would be made to existing businesses in future years. Just because a client was an existing client did not mean that it would continue to buy Ariki's products to the same level of revenue. Thus the sum would alter up or down depending on the levels of revenue received in each year from existing accounts.

[8] It was implicit in this arrangement that there would need to be periodical reconciliations between the actual existing business account sales (and thus the 12% commission owing to Ms Moore-Jones as a result) and the moneys paid to Ms Moore-Jones in advance of \$1,000 per month as an agreed but rough proxy. Unfortunately, for reasons entirely outside Ms Moore-Jones' responsibility, no such reconciliation was done until over two years later.

[9] As an independent contractor on commission only sales, Ms Moore-Jones was responsible for her own taxation arrangements, including GST, schedular payments (formerly known as withholding tax) and ACC. She found this burden unreasonable and approached the Bairds about this and her view that the job required two days a week, being approximately 40% of a full time job. There is no doubt that Ariki agreed to Ms Moore-Jones' requests that she work two days a week and that she no longer be required to meet any taxation responsibilities. There is, however, a

differing interpretation of the implications of this for the real nature of the relationship between Ms Moore-Jones and Ariki. Mr Baird in particular gave evidence that he never agreed that she would become an employee in April 2012, as did Mrs Baird. It was their view that as Ms Moore-Jones was a commission salesperson, the more time she spent on Ariki's work the better it would be for both parties, as she would generate more income for Ariki and herself. Mr Baird did not address the issue of tax at the time, but believed he would have expected a shift to schedular payments rather than income tax.

[10] In fact, with effect from the payroll run on 22 April 2012, Ms Moore-Jones' income was accounted for by Ariki as an employee and thus she received payslips, was enrolled in KiwiSaver and was paid for 18.5 hours per fortnight at the rate of \$24.9481 per hour in set wages. This was increased in August 2012 to 37 hours per fortnight, which equated to around two days per week.

[11] It is from this point that Ms Moore-Jones claims that she was, by agreement, now an employee. While Ariki denies that, it is significant that in later correspondence on the reconciliation having been done over alleged overpayments, Mr Baird specifically addressed the issue of independent contractor or employee. On 15 October 2013, he noted that Ariki was now completing a reconciliation of commissions. He also stated:

*I think that there has also been a complicating factor with Keshni having treated you as an employee rather than as a person on commission. Hopefully both these problems can be sorted out with some discussion between us.*

[12] Ms Moore-Jones responded, stating:

*When I originally started I was paying my own tax, I then asked you if you could put me on the payroll, so I didn't have to go through the process of filing a tax return.*

[13] In response, Mr Baird stated on Friday, 18 October 2013:

*We had no trouble in switching you over to effectively become a part time employee and paying your PAYE. However, a problem has arisen since that time which I will explain in a separate email."*

[14] This is a significant statement by Mr Baird, a trained lawyer, in determining the disputed issue over the real nature of the relationship. I conclude from this email that Ariki accepted that the parties intended that Ms Moore-Jones become an

employee at the time she was put on the payroll. Intention is only one factor, however, in determining the real nature of relationships between parties.

[15] Subsequently the parties agreed to trial Ms Moore-Jones working three days a week, but this effectively did not operate because of the claims for overpayment made by Ariki to Ms Moore-Jones following the reconciliation undertaken by Ariki's accounts person.

[16] Like many sales roles, Ms Moore-Jones' work involved a great deal of freedom. Ms Moore-Jones worked remotely based from her own home. She could work at any time and could and did work for other employers. She had her own vehicle and provided her own office equipment. She had little direct contact with the principals of Ariki other than monthly reporting responsibilities. She met with the Bairds seldom (probably only a couple of times a year) and did not apply for annual or sick leave although she did inform Ariki when she was going to be absent for any period. This is not surprising given that this was a part time role and she could make up time, as a result of her being absent, at other times to suit herself. On the other hand, Ms Moore-Jones had informed the accounts person that she had taken two days' annual leave on one occasion. During this period Ms Moore-Jones also took a Kiwi Saver holiday for a short period and this was never questioned by Ariki. Ms Moore-Jones had no right to get someone else to do her work for her.

[17] These proceedings have their genesis in an accounts person from Ariki reconciling the commissions paid to Ms Moore-Jones with sales revenues in October 2013. The sum of \$11,872.01 (a sum undisputed by Ms Moore-Jones in terms of the way it was calculated) was finally, after some discussions with Ms Moore-Jones, identified by Ariki. The basis of the overpayment occurred due to what I accept was a mistake by Ariki's accounts person in paying Ms Moore-Jones an hourly rate, when it had never been agreed (or even been discussed) that she would be paid an hourly rate. The hourly rate was simply calculated by dividing \$12,000 per year by 52 weeks or 17 hours a fortnight. The proper calculation was as set out in the parties' agreement, namely 12% commission on sales to existing clients and 15% commission on new clients' business.

[18] I note that no issue as to the minimum wage applies (and none was claimed) because, even under the reconciled sales figures, Ms Moore-Jones has earned in

excess of the minimum wage. Although it is not possible to calculate that for every week, she was certainly paid well in excess of the minimum wage on average.

[19] Ms Moore-Jones was very upset about the claimed overpayment as she had simply relied on Ariki to pay her properly. As someone who was suffering financial difficulties and lived week-to-week, she simply spent the money that she had received on normal living expenses in good faith.

[20] In his letter attaching the reconciliation, which at that time was said to amount to \$10,837.33, Mr Baird stated:

*Please accept our apologies for what has eventuated as there is quite a substantial amount involved with what we have overpaid you. The next question is how we should resolve this problem as we understand that it would be unreasonable for us to demand that the overpayment is immediately repaid. However, before anything is agreed to you should carefully scrutinise what is shown in the attachment to see that you agree, or if you do not understand what Namesh has shown in the attachment then we need to discuss it so both you and us are in agreement. When we reach the agreement stage we can discuss what should then happen which could be a combination of things, and we are open to any suggestions that you may make as you know your financial situation far better than us.*

[21] Mr Baird sought a response within the next week. However, matters were not pursued as quickly as that by any means. In the meantime, Ms Moore-Jones continued to receive her regular \$1400 per month payments, but not the 15% commission on new business. Those sums were withheld by Ariki on the basis that Ms Moore-Jones owed it money.

[22] The parties did not meet to discuss the matter formally until 17 February 2014. I accept that the primary reason for this delay of four months lay with Ariki, with the accounts person being away for six weeks and then Mr and Mrs Baird being away for the month after that. During this period, i.e. at the end of 2013, Ms Moore-Jones was required to sell her home because she was unable to make mortgage payments after the death of her partner.

[23] At the meeting were the Bairds, Ms Moore-Jones, and her lawyer. While at the meeting both parties committed to having an ongoing relationship, what was at issue was the nature of the relationship and Ariki's demand for restitution of the alleged overpayments. It was left to Ariki to provide Ms Moore-Jones with a contract

for services for her consideration, which would include proposals by Ariki for repayment of the outstanding payments.

[24] The proposed contract for services was provided by Ariki on 11 March 2014. In essence, while the proposed agreement left a number of matters such as phone, parking and travel expenses to be agreed, the key elements were that Ariki would pay Ms Moore-Jones \$400 per week for a two day week, but that this payment would be tied to performance, based around sales of \$130,000 per year. However:

*20% of the daily rate is to be retained by the principal and will be paid to the contractor at the end of each two monthly review provided that the contractor has reached the two monthly sales expectation which will be seasonally adjusted.*

[25] It also provided that if total sales for the first 12 months exceeded \$135,000 then \$3,000 of the overpayment would be forgiven. It appears that no other proposals were made in respect of the alleged overpayment, except that it was clear that the overpayments needed to be repaid. However, it was implicit that if Ms Moore-Jones had met Ariki's performance targets, the debt would have been forgiven within four years.

[26] Ariki asked for a response by 31 March 2014 but this was not forthcoming. On 1 April 2014, Mr Haines wrote on Ms Moore-Jones' behalf as her lawyer, indicating that there would be a response by the end of the week. He also added:

*Your offer was not in line with Julie's expectations and there appear to be many substantial issues that have not been addressed by your offer. This is clearly an important issue for Julie and she wants to consider all her alternatives prior to providing a response.*

[27] Ms Moore-Jones' response was in fact to resign, which she did on two weeks' notice, despite Ariki trying to dissuade her from this approach. In particular, Ariki noted that it remained:

*... committed to reaching an agreement on the nature and conditions of their ongoing relationship which are acceptable to Ms Moore-Jones and would welcome the opportunity to canvas Ms Moore-Jones' views on the proposed contract for services to enable this to occur. We trust Ms Moore-Jones will withdraw her "resignation" and at the very least provide our respective clients the opportunity to reach an agreement on the basis of their ongoing relationship.*

[28] The letter also noted that Ariki would still be pursuing repayments, although it would be reasonable about the manner of repayments.

[29] Ms Moore-Jones did not withdraw her notice of resignation. The reasons for her resignation were that:

- She simply did not trust Ariki to treat her fairly anymore;
- Her guaranteed pay would reduce to \$160 per week, which she could not live on, even with another job;
- She would have to be committed to working for Ariki for another three or four years before, all going well, the alleged debt would be repaid;
- Ariki had consistently delayed in responding to her since October 2013;
- Ariki was unrelenting in its insistence that she repay a very large sum that had not arisen through any fault of her own and which she could not repay;
- Ariki had withheld her 15% commission on new business for some time.

[30] Ms Moore-Jones was active in attempting to seek work but she did not get a new job to replace the income lost from Ariki for another three months.

[31] The parties have attended mediation but have been unable to resolve matters. It therefore falls to the Authority to make a determination.

### **The law**

[32] Under s.6 of the Employment Relations Act 2000 (the Act), the Authority must determine the real nature of the relationship between the parties. In doing so, it must consider all relevant matters including any matters that indicate the intention of the parties. It is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[33] As a result of cases such as *Bryson v. Three Foot Six Ltd* [2005] NZSC 34, *Tsopakias v. Fendalton Construction Ltd* (unreported, Colgan CJ, WRC36/08, 18 June 2009) and *Chief of Defence Force v. Ross-Taylor* [2010] NZEmpC 22, the following matters are also clear.

[34] All relevant matters include all terms of the agreement between the parties, which will usually contain indications of common intention. Divergences from or supplementations of those terms as they operate in practice are also relevant. The control, integration and fundamental tests are also relevant, although not determinative, as are any common intentions of the parties. In addition, taxation arrangements are relevant, but consideration must be given to whether the taxation arrangements are simply a consequence of the labelling of the relationship by the parties.

[35] As was noted in *Amark Publishing New Zealand Ltd v. Kendall* (unreported, Goddard CJ, C10/95, 14 August 1995) commission salespersons' positions are equally subject to being contracts of services or contracts for service depending on the particular nature of the relationship, especially where payment is by commission only. In that case, the worker involved had shifted between being a contractor and an employee (and vice-versa) on several occasions during the course of the parties' relationship.

[36] Constructive dismissal relates to whether the initiative for the termination of the employment relationship originates from the employer rather than the employee. It is not necessary for an employer to wish for an employee to leave however, provided there has been a sufficiently serious breach of duty from which it is reasonably foreseeable that the employee would leave. In other words, the test is whether a substantial risk of resignation was reasonably foreseeable (*Auckland Electric Power Board v. Auckland Provincial District Authorities Officers IUOW* [1994] 1 ERNZ 168 (CA)).

[37] *Foai v. Air New Zealand Ltd* [2012] NZEmpC 57 deals with claims for restitution from an employee who has been overpaid by mistake. There it was held that defences to such a claim included change of position (which is available to anyone whose position has so changed that it would be inequitable in all the circumstances to require them to make restitution or alternatively restitution in full). There is also the statutory defence of alteration of position under s.94B of the Judicature Act 1908. This provides that relief, whether under s.94A or in equity or otherwise, in respect of any payment made under mistake (whether of law or of fact), shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the

payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be. Thus a balancing of competing equities is required.

### **Determination**

[38] On balance, I conclude that the real nature of the relationship, after Ms Moore-Jones was put on the payroll as intended by the parties, was one of employer and employee. The intention of the parties is significant in a case such as this where differing sales reps in different areas can easily be employees or contractors, as is clear from *Amark* and as occurred here with the three sales reps. Fundamental to the intention of the parties were Mr Baird's statements about Ms Moore-Jones effectively becoming a part-time employee. This is a significant statement by Mr Baird, a trained lawyer, in determining the disputed issue over the real nature of the relationship. I conclude from this email that Ariki accepted that the parties had implemented Ms Moore-Jones' proposal that she become an employee at the time she was put on the payroll. Intention is only one factor, however, in determining the real nature of relationships between parties.

[39] While there are significant indicators pursuant to the control and integration tests that are inconsistent with employment, as set out, in particular, in para. [16] of the facts section, there are insufficient indicators to negate the intention of the parties. Effectively, Ariki had the right of control over Ms Moore-Jones' work. Similarly, for instance, there was no prospect of her subcontracting the work to someone else, or even for someone else to cover for her if she were ill. Similarly, while Ms Moore-Jones was not integrated into Ariki's operations by way of uniform or other method of identification, she was part of Ariki and there was no other entity such as a company that operated between her and Ariki.

[40] Furthermore, it is clear that Ms Moore-Jones was not in business on her own account. The only way she could improve her income from Ariki was by working longer hours. As noted above there was no independent trading entity such as a company or partnership. She was paid as an employee, including being enrolled in Kiwi Saver. As a result I conclude that the fundamental test is more consistent with a relationship of employment.

[41] There is no evidence as to industry practice. However, I note that it was found in *Amark* that industry practice of commission sales people can vary freely between contracts of and for services.

[42] I therefore determine that the real nature of the relationship between the parties was that of employer and employee.

[43] Breach of duty was the only ground on which constructive dismissal could be found in this case. Had this matter merely involved negotiations over the repayment of the sums mistakenly overpaid, this would have been very unlikely to found a claim for constructive dismissal, even given Ms Moore-Jones' inability to repay the sum owing because she had changed her position. However I accept that there were a number of breaches of duty by Ariki in this case. First, it entered into an unlawful form of self-help by denying Ms Moore-Jones the 15% payment of commissions on new clients. It did so knowing Ms Moore-Jones was in a very difficult financial situation and did not agree to the change. It did so simply as a way of assisting itself getting the overpayments back more quickly. It continued with its failure to make such payments even after Ms Moore-Jones drew their importance to her to its attention. There are few more fundamental breaches to an employment agreement than to fail to honour the terms of payments. This is particularly so in the circumstances where Ms Moore-Jones was not responsible for, and was not aware of, any overpayments made in error by Ariki. This is by far the most serious breach of duty by Ariki to Ms Moore-Jones.

[44] Second, Ariki was the main cause of the delays in dealing with this matter over a number of months, when it should have been cleared up much more quickly. This, understandably, led Ms Moore-Jones to be mistrustful of Ariki.

[45] Third, while not a breach of duty of itself, Ariki then sought to change the fundamental nature of the agreement between the parties in a number of ways. In particular, it sought to change Ms Moore-Jones' status to that of a commission sales person rather than employee, even although she was prepared to consider that. The other proposals put in the new agreement by Ariki would have had a more substantial impact on Ms Moore-Jones because they would have reduced her regular, as opposed to intermittent, payments.

[46] In these circumstances, which were particularly financially and personally stressful for Ms Moore-Jones I hold that it was reasonably foreseeable that she would not put up with the totality of her treatment and resign. On the other hand, I do not accept that the issue of the overpayment would ever found a constructive dismissal, nor the fact that negotiations were ongoing.

[47] On balance, I conclude that Ms Moore-Jones was constructively dismissed despite the desire of Ariki's principals to maintain her association with it and its willingness to negotiate further. Unfortunately for Ariki, on an objective analysis, it had unfairly and unlawfully withheld remuneration from Ms Moore-Jones and delayed for so long and sought such significant changes to the terms of her association with Ariki, that a substantial risk of resignation was reasonably foreseeable. While Ms Moore-Jones could have notified her decision in such a way that allowed Ariki a better opportunity to respond to it and perhaps have her reconsider, she was not obliged to do so given the severity of the breaches set out above.

[48] I accept that Ms Moore-Jones has attempted to mitigate her loss by trying to find alternative employment, but was not successful in the first three months after her constructive dismissal. I also note that the three days trial did not effectively commence and therefore she is not entitled to be paid on that basis. In any event, her payment was to be by way of commission only. Thus she is entitled to be paid on the basis of the last three months' (13 weeks) commissions she earned at Ariki, including both the 12% and 15% commission rates. Leave is reserved for the parties to revert to the Authority should agreement not be able to be reached on this sum.

[49] Ms Moore-Jones is also entitled to be compensated for the loss of dignity and injury to feelings she felt as a result of her being unjustifiably constructively dismissed. Ms Moore-Jones provided clear evidence of the impact of the dismissal on her. She was in extremely straitened financial circumstances and yet she was not being paid her commissions. The timing and nature of her constructive dismissal clearly had a significant impact on her. I therefore assess compensation at \$10,000.

[50] There is no issue as to contribution by Ms Moore-Jones. She was never in breach of her employment obligations and there was no blameworthy behaviour on her account for which remedies would have to be deducted.

[51] Ordinarily, due to Ms Moore-Jones' ongoing financial difficulties and the fact that she spent the overpayments as she earned them, with all fault being that of Ariki, she could rely on the defences set out in *Foia*. However, in this case Ms Moore-Jones has just been awarded compensation in excess of the sum owing, which is the opposite situation to *Foia*. The issue is therefore whether Ms Moore-Jones should be required, in equity and good conscience, to repay what were undisputed overpayments. I conclude that in the circumstances here, it is equitable, given that Ariki has been ordered to pay Ms Moore-Jones a greater sum than she owes it, for Ms Moore-Jones to pay Ariki the money she owes it. I therefore order that restitution be made in full.

### **Summary of orders**

[52] I order the respondent, Ariki New Zealand Limited, to pay to the applicant, Ms Julie Moore-Jones, the sum of \$10,000 compensation and three months commissions. On the other hand, I order the applicant, Ms Julie Moore-Jones, to pay to the respondent, Ariki New Zealand Limited, the sum of \$11,872.01 (less accounting for tax).

[53] Unfortunately, the Authority does not have the power to order set-off, but in this case that would appear to be a practical solution for both parties.

### **Costs**

[54] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**