

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 226
3163641

BETWEEN REAL ESTATE BROKERS
LIMITED
Applicant

AND VINEULA AHOKAVA
Respondent

Member of Authority: Rachel Larmer

Representatives: Deep Purusram, counsel for the Applicant
Respondent in person

Investigation Meeting: On the papers

Submissions and Further Information Received: 16 May 2022 from the Applicant
10 May 2022 from the Respondent

Date of Determination: 31 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination records the Authority's findings on whether or not it has jurisdiction to investigate the Applicant's claims, by determining whether or not the parties were in an employment relationship.

[2] The Applicant's principal business involves providing real estate services to clients to facilitate residential and commercial property sales. Mr Jeewan Chanaka Kumara Delwala Delwalage is the sole director and shareholder of the Applicant. The Respondent is a licensed salesperson.

[3] On 6 March 2017 the Applicant engaged the Respondent as a licensed salesperson. The parties signed an independent contractor agreement that recorded the parties rights and obligations.

[4] On 12 June 2020 the Respondent filed a claim in the Disputes Tribunal alleging that the Applicant had failed to pay her commission she was owed under the independent contractor agreement. On 5 October 2020 the Disputes Tribunal issued a decision in the Respondent's favour.

[5] On 2 October 2020 the Applicant had applied to the Disputes Tribunal for a stay of the proceedings and for a hearing of the Respondent's claim. On 8 December 2020 the Disputes Tribunal dismissed the Applicant's 'stay of proceedings' application but granted a re-hearing of the Respondent's claim against the Applicant, on the basis the Applicant had not attended the Disputes Tribunal hearing.

[6] The Applicant subsequently claimed that the Disputes Tribunal did not have jurisdiction over the Respondent's claims, because the parties had been in an employment relationship, so the Employment Relations Authority had exclusive jurisdiction over any disputes between the parties.

[7] The Respondent denied the parties had ever been in an employment relationship. She said she had always been an independent contractor, and that the parties had acted consistently with that. She was paid commission instead of wages/salary, was GST registered paid her own taxes. There was no evidence that the parties had acted inconsistently with the terms of the written agreement they had signed.

[8] The Applicant did not deny the parties had signed an independent contractor agreement, but instead claimed the relationship had changed over time into an employment relationship. The Respondent denied that.

[9] On 2 November 2021 the Disputes Tribunal issued a second decision involving these parties. The Disputes Tribunal held that the jurisdiction issue (whether or not the parties had been in an employment relationship) had to be determined by the Authority, because it had exclusive jurisdiction over employment relationships.

The Investigation

[10] The Authority has conducted an ‘on the papers’ investigation, based on information the parties provided.

[11] Prior to this determination the Authority issued a Minute to the parties dated 3 May 2022 that set out its preliminary view that it did not have jurisdiction over this matter. The parties were referred to s 6(4) of the Employment Relations Act 2000 (the Act) and s 51(2) of the Real Estate Agents Act 2008 (the REAA) and were invited to address the relevance of that legislation to this matter.

[12] Mr Purusram filed submissions on 16 May 2022 in response to the Authority’s Minute. However, the submissions failed to address either of the sections the Authority had referred the parties to.

Issues

[13] The issue to be determined is whether or not the parties were in an employment relationship.

[14] If so, then the Authority has exclusive jurisdiction to investigate and determine the parties’ dispute. If not, and the Respondent is held to have been an independent contractor, then the Authority does not have jurisdiction over the parties’ disputes.

Were the parties in an employment relationship?

[15] Section 6 of the Act identifies the meaning of employee. Section 6(2) of the Act requires the Authority to determine “*the real nature of the relationship*”. When doing that, s 6(3) of the Act requires the Authority to consider all relevant matters, including the parties’ intention, but the parties’ intention is not to be determinative of the real nature of their relationship.

[16] However, in this case sections 6(2) and (3) do not apply, because s 6(4) of the Act supersedes it.

[17] Section 6(4) of the Act states that “*subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 [...]*”.

[18] Section 51(2) of the REAA states that:

Any written agreement between an agent and a salesperson **is conclusive** so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor. (emphasis added)

[19] The parties provided the Authority with a copy of the Real Estate Brokers Limited Salesperson's Agreement for Services, that they both signed on 6 March 2017 ("the Contract").

[20] Clause 2 of the Contract states that pursuant to the REAA, "*the salesperson is engaged by L J Hooker as **an independent contractor** and not as an employee, joint venturer or partner of L J Hooker.*" (emphasis added)

[21] Section 4 of the REAA states:

Salesperson means a person who holds, or is deemed to hold, a current license as a salesperson under this Act; and

Licensee means an agent, a branch manager, or a salesperson.

[22] Although the Authority invited the Applicant to provide evidence/information that contradicted that the Respondent was a salesperson and/or licensee under the REAA and/or that the parties had signed the Contract, no such evidence/information was provided.

[23] Accordingly, there did not appear to be any dispute that at the material times the Respondent was a salesperson, and a licensee, as defined by s 4 of the REAA or that their relationship was governed by the Contract they signed.

[24] The Respondent was engaged "*as an independent contractor*", in accordance with written agreement (the Salesperson's Agreement for Services, referred to as the Contract) that had been signed by the parties on 6 March 2017.

[25] That means that in accordance with s 51(2) of the REAA, the Authority cannot look behind the terms of the Contract, because it clearly recorded that the Respondent was an independent contractor. Clause 2 of the Contract made that very clear because it was headed in bold "**Independent Contractor**".

[26] Section 51(2) of the REAA does not permit the Authority to determine that the real nature of the relationship between these parties is something other than the relationship that is clearly recorded in the Contract they signed in March 2017, because it was a written contract that was governed by the REAA.

[27] The Authority must therefore rely on the terms of the Contract the parties signed as being conclusive evidence of the status of their relationship, namely that the Respondent was an independent contractor.

Outcome

[28] The Authority does not have jurisdiction over the disputes between these parties. Accordingly, the parties would need to revert to the Disputes Tribunal regarding any unresolved issues between them.

Costs

[29] The Respondent was self-represented so there is no issue as to costs.

Rachel Larmer
Member of the Employment Relations Authority