

**Attention is drawn to the order  
prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 87  
5383531

BETWEEN	BARBIE ROBERTS Applicant
A N D	Y Respondent

Member of Authority:	M B Loftus
Representatives:	Ceara Rooney, Advocate for Applicant Mark Henderson, Counsel for Respondent
Investigation meeting:	21 March 2013 at Christchurch
Submissions Received:	At the Investigation Meeting
Date of Determination:	14 May 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Barbie Roberts, claims she was unjustifiably dismissed by the respondent, Y, on 16 February 2012.

[2] Y accepts she terminated the relationship between the two but denies the cessation amounted to a dismissal as Ms Roberts was a self employed contractor.

**Citation of the respondent and suppression**

[3] The name used by the respondent as at the date of the investigation meeting differed from that used when the matter was filed. The citation was changed by consent.

[4] Regardless, Y's identity has now been suppressed. This was also by consent and in order to protect the identity of Y's son, given his medical situation.

### **Background**

[5] Y and her husband have a young son, Z. Initially he was cared for by an employed nanny while Y continued operating her business. At approximately 16 months of age a paediatrician diagnosed possible autism and recommended a treatment known as ABA Therapy. It was recommended Z receive between 20 and 30 hours of therapy a week along with other measures including *one-on-one attention at all times by either one of you* (his parents).

[6] As a result Z spoke to the nanny and concluded an arranged cessation.

[7] Contact was also made with Ms Lisa Luxton, an ABA therapist with Autism Association New Zealand. This resulted in a meeting at which Y was introduced to Ms Roberts. An arrangement was entered into whereby Ms Roberts, a therapist qualified to undertake ABA therapy, would care for Z.

[8] Y says the arrangement saw Ms Roberts and Ms Luxton share responsibility for Z's therapy. In addition, and as the result of a suggestion made by Ms Luxton, it was agreed Ms Roberts, having conducted the morning ABA session, would remain while Z slept before Ms Luxton arrived to conduct the afternoon session. This appears to have met the needs of all concerned. Y says it was agreed Ms Roberts would charge \$20 per hour for this service as opposed to the normal \$25 per hour for ABA therapy. Y says there was not, however, any discussion or distinction between how she was engaged for both services and she remained an independent contractor throughout.

[9] Y goes on to say she understood both Ms Luxton and Ms Roberts worked as co-contractors. Both would be paid on presentation of invoices and responsible for their own taxes etcetera. She did not therefore put them on her company's payroll as she had the previous nanny.

[10] Ms Roberts has a different view. She says:

*It was my understanding that the nanny work and the therapy were two different roles. We were going to try and incorporate therapy work in throughout the day when I felt like the baby was up to it.*

*I was to carry out the therapy work and bill the family separately for this. In this role I was a therapist working as a contractor for the Autism Association. I was to be paid different rates, as I stipulated my own rate for the therapy, and I saw this as a completely separate from that of the nanny.*

*In the nannying role my main focus was to care for the baby. I was to give him breakfast in the morning, interact with him, feed him lunch and so on. The primary focus was on him and then if I had time I would do housework or other jobs that [Y] asked me to do.*

[11] Y accepts Ms Roberts performed a variety of tasks, including household ones, but states this was only because Ms Roberts volunteered to do so in order to keep herself occupied while Z slept. She was extremely grateful for the offer and willingly accepted it.

[12] As events transpired the relationship did not last long. This was for two reasons. First Y was not happy with Ms Roberts' work and, second, Z's diagnosis changed. The paediatrician recommended changes to the treatment which would see Y taking a greater role in her son's treatment and she advised Ms Roberts she was no longer required.

[13] There is significant dispute about how Ms Roberts was advised of the discontinuation but that need not be discussed for the purpose of determining this application.

### **Determination**

[14] There are, potentially, three issues that require determination. The first is the nature of the relationship – contractor or employee.

[15] The second and third need only be determined if it is concluded Ms Roberts was an employee. They are whether or not she was dismissed and if so, can the dismissal be justified.

[16] I have considered the law that applies to determining the status of an arrangement, the party's positions and the evidence (in particular, various concessions from Mesdames Roberts and Luxton when answering questions).

[17] Having done so I conclude Ms Robert was, as claimed by Y, a contractor.

[18] I reach this conclusion for a variety of reasons. They include the following:

- (a) It is common ground Ms Roberts was introduced as a contractor capable of meeting Y's prime need, the administration of ABA therapy.
- (b) Ms Luxton confirms she advised Y therapists were self employed contractors who paid their own taxes and ACC levies. It is clear Y and her husband understood they were entering into a relationship with contractors who would deliver the therapy they sought.
- (c) While Ms Roberts claims she was engaged, at least for part of the time, as an employee, she continuously prefaced this claim with the word *assumption*. Neither she (nor Ms Luxton) ever claimed her assumptions regarding her status were expressly confirmed or anything occurred which may have dissuaded Y and her husband from the understanding enunciated in (b) above. Both agree the only status expressly discussed was the contractual one applying to the delivery of therapy. Indeed, Ms Roberts agrees she took little interest in the discussion and her recollection was vague. The care arrangements were discussed with Ms Luxton and she (Ms Roberts) actually left before the discussion was completed. In these circumstances I must prefer the evidence of Y and her husband.
- (d) While there was a roster and hours were pre-determined that was in order to meet the therapy regime specified by Ms Luxton. It was not control exercised by Y but, in any event, the evidence shows a level of flexibility to meet the needs of both Y and Ms Roberts.
- (e) While it is accepted Ms Roberts performed other tasks, the evidence suggests this was not out of obligation but by agreement and a desire to fill her time while Z was asleep.
- (f) Y largely liaised with Ms Luxton, rather than Ms Roberts, during the course of the engagement and a history of text messages confirms it was Ms Luxton who would notify Ms Roberts of changes to the way the work was performed and way in which the therapy was administered.

- (g) The Autism Association, through Ms Luxton, supplied the toys required for the therapy which were used by Ms Roberts in her work. While there was one occasion when Ms Roberts took Y to the toy library, there is no evidence the association relinquished the duty of choosing and providing the tools of trade – namely the toys.
- (h) Ms Roberts rendered invoices and accepted, when answering questions, that is what she considered them to be. The view they were invoices was amplified by her advocate in correspondence. Employees do not render invoices – contractors do. Furthermore, there was no attempt to differentiate between time providing the therapeutic service and work as an employed nanny – they covered all hours Ms Roberts was engaged by Y.
- (i) Finally there is the fact Ms Roberts was not paid holiday pay (Waitangi Day) and nor did she seek it. She accepted, when answering questions, the nature of her engagement would disentitle her. Likewise she accepted that if she was sick there would be no pay. An arrangement whereby a service provider accepts responsibility for sickness and holidays is indicative of a contractual relationship as opposed to one of employment.

## **Conclusion**

[19] As already said, it is my conclusion Ms Roberts was engaged as a contractor. Her claim of unjustified dismissal must therefore fail as she is not entitled to bring a personal grievance.

[20] Pursuant to clause 10(1) of the second schedule of the Employment Relations Act 2000 I prohibit from publication the name of the respondent, her son and any information that may identify them.

[21] Costs are reserved.