

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 228
3309101

BETWEEN SAMANTHA SELWOOD
Applicant

AND EASTERN REALTY
LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Ira White, advocate for the Applicant
Stephen Langton and Marina Povey, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions and further information received: Up to and including 27 January 2025

Determination: 24 April 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Samantha Selwood worked at Eastern Realty Limited (Eastern Realty). Eastern Realty carries on business in the real estate industry in Hawkes Bay as a franchisee to Baileys Realty Group.

[2] Ms Selwood signed a contract for services on 20 April 2022. The contract included supplementary terms referencing work to be performed as a sales associate for a real estate agent, Caroline Meo. On 2 October 2023, Ms Selwood was advised by Eastern Realty that the arrangement with Ms Meo was being terminated. Ms Meo is not named as a respondent.

[3] Ms Selwood has lodged a statement of problem claiming that she was an employee, that she was unjustifiably dismissed and was not correctly paid various leave entitlements, and seeking various remedies including compensation for humiliation, loss of dignity, and injury to feelings.

[4] Eastern Realty denies the claims made and contend that Ms Selwood was engaged as an independent contractor, and not as an employee, on a contract for services and in accordance with s 51(2) of the Real Estate Agents Act 2008 (the REAA).

[5] This determination deals with the preliminary issue as to whether Ms Selwood was engaged as an independent contractor or an employee.

The Authority's investigation

[6] The Authority held a case management conference on 26 September 2024. It was agreed that the preliminary issue could be dealt with 'on the papers' without the need for an in-person investigation meeting. Timetable directions were issued providing the parties an opportunity to lodge affidavit evidence, documents, and submissions.

[7] An affidavit from James Macpherson, principal and director of Eastern Realty was lodged. No affidavit was received from Ms Selwood.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[9] The preliminary issue for investigation and determination is whether Ms Selwood was engaged as an independent contractor or an employee having regard to s 6(4) of the Act. That in turn requires consideration of the application or otherwise of s 51(2) of the REAA, which deals with the employment status of salespersons, to Ms Selwood.

Background

[10] Mr Macpherson emailed Ms Selwood on 14 April 2022 attaching an offer. The email described the attachment as being an 'employment agreement'. However, the

relevant document was a contract for services. The contract for services explicitly described the relationship as being a contract for services and not one of employment.¹

[11] Ms Selwood declined the offer made by email of 15 April 2022. That email referred to the proposed terms relating to remuneration as being unsatisfactory.

[12] Ms Selwood ultimately returned a signed contract for services on 21 April 2022, that contract having been signed by both Mr Macpherson and her on 20 April 2022. The contract for services contained explicit reference to Ms Selwood being engaged as an independent contractor and not as an employee.²

[13] The change between the original contract for services and the one that Ms Selwood signed related to the calculation and payment of bonuses on commissions. That was originally dealt with under the heading “Samantha as an Independent contractor”, but then in the later version was dealt with together with other remuneration details.

[14] The contract for services was between Eastern Realty (described as the “Agent”) and Ms Selwood (described as the “Licensee”). The contract for services, at clause 4, expressly states that Ms Selwood would be engaged as an independent contractor.

[15] Mr Macpherson’s evidence is that Ms Selwood was contracted to Eastern Realty, but that her primary duties were to work as sales associate to Caroline Meo as part of Ms Meo’s ‘team’. Ms Meo was at all relevant times a real estate agent. Mr Macpherson says Ms Meo’s team included Ms Selwood, a licenced salesperson, and another person who was employed to carry out administrative work. He also says that Ms Selwood’s role mostly involved real estate work with there being a small amount of administrative work.

[16] There was a breakdown in the relationship between Ms Meo and Ms Selwood. Mr Macpherson’s evidence is that they were no longer able to work professionally together and that he subsequently, on 2 October 2023, met with Ms Selwood and gave notice of termination to her. The termination letter dated 2 October 2023 included the following:

...

¹ At clause 4.

² At clause 4.

Re: Termination of Contract between Caroline Meo and Samantha Selwood

As per your signed Licensee Contract of Services in the Supplementary or Varied Terms and Conditions dated 20 April 2022 (a copy of which is attached to this letter), Caroline Meo has decided to give you 4 weeks' notice of termination for the agreement between yourselves. The arrangement will terminate at the end of the 4 weeks' notice period on Monday, 30 October 2023.

You will be paid all your entitlements to the date of Monday, 30 October 2023.

The arrangement between yourself and Caroline Meo is superseded with you having a Licensee Contract of Services between yourself and Eastern Realty Limited.

....

[17] Mr Macpherson says it was made clear it was only the relationship with Ms Meo that was being terminated and that attempts were made to contact Ms Selwood to discuss other possible options. However, Ms Selwood did not return to work and Mr Macpherson says that Eastern Realty then treated the whole contract as having come to an end.

Analysis and discussion

[18] Section 6 of the Act provides the meaning of 'employee' for the purposes of the Act. To the extent s 6 of the Act addresses the matters the Authority must take into account when considering if a person is employed under a contract of service, subsection 6(4) of the Act provides that they "...do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937."

[19] Section 51 of the REAA provides as follows:

51 Employment status of salesperson

- (1) A salesperson may be employed by an agent as an employee or may be engaged by an agent as an independent contractor.
- (2) 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.
- (3) An agent who engages a salesperson as an independent contractor is liable for the acts and omissions of the salesperson in the same manner, and to the same extent, as if the agent had employed the salesperson as an employee.

[20] 'Salesperson' is defined in the REAA as meaning "...a person who holds, or is deemed to hold, a current licence as a salesperson under the Act." A salesperson, in

carrying out agency work, must be supervised by an agent or branch manager.³ The meaning of ‘agent’ includes a real estate agent holding a current licence as an agent under the REAA.⁴

[21] The question in this case is whether the written agreement between the agent and salesperson expressly states that the relationship between the two is that of employer and independent contractor.

[22] Eastern Realty contends that the services provided by Ms Selwood to Ms Meo were provided as an independent contractor and that they were part of a package of services provided to Eastern Realty under the contract for services.

[23] Ms Selwood accepts she was provided a contract for services as a licenced salesperson but in submissions asserted that she was acting as an employee under ‘supplementary or varied terms and conditions’ with Ms Meo. Ms Meo is not named as a respondent in the statement of problem lodged and instead it proceeds on the basis that Eastern Realty were the employer. Ms Selwood contended, in the course of submissions, that dual agreements were created and that the ‘supplementary or varied terms and conditions’ do not meet the requirements of s 51(2) of the REAA.

[24] It was submitted for Ms Selwood that there were two relationships under the contract entered into. First, a contract for services between Ms Selwood and Eastern Realty. Second, an employment relationship between Ms Selwood and Ms Meo. It is said that the employment relationship arises or is supported by the following reference in the supplementary conditions:

Termination of Contact between Samantha Selwood and Caroline Meo:

Terminated by either party giving 4 weeks’ notice and the arrangement will terminate at the end of the 4 weeks’ notice period.

At termination between Samantha and Caroline, the contract between Easter Realty Limited and Samantha Selwood will supersede.

[25] The above is included in supplementary terms of the contract for services. They describe the role as being “Sales Associate for Caroline Meo”. In addition to the above referenced section as to termination, the supplementary terms include details relating to hours of work, remuneration, and a job description.

³ Real Estate Agents Act 2008, s 50(1).

⁴ Real Estate Agents Act 2008, s 4(1).

[26] I agree with the submissions of Eastern Realty that the relevant relationship involved the engagement of Ms Selwood by Eastern Realty under the contract for services and that the supplementary terms described the work that Ms Selwood would do as part of Ms Meo's 'team' for Eastern Realty. The supplementary terms do not amount to a separate agreement.

[27] Even if I were wrong about the above, the supplementary terms cannot be read in isolation as establishing an employment relationship. Clause 4 of the contract for services expressly provides that Ms Selwood is an independent contractor and not an employee. The supplementary terms form part of the written agreement between the agent and salesperson and they also refer to Ms Selwood as being an independent contractor.

[28] The written agreement expressly describes the relationship as being a contract for services. I am satisfied that the express references in the contract for services are sufficient to establish that the relationship was conclusively one of agent and independent contractor. Section 51(2) of the REAA provides that the written agreement is conclusive. As such, the Authority is unable to look behind the contract to consider the real nature of the relationship as might otherwise be the case.

[29] I also consider that, even if the supplementary terms could be taken as establishing a separate arrangement, the reference to independent contracting in the supplementary terms would otherwise be sufficient to meet the requirement at s 51(2) of the REAA.

[30] There was no employment relationship between Ms Selwood and Eastern Realty, nor between Ms Selwood and Ms Meo.

Conclusion

[31] I find that Ms Selwood was not an employee of Eastern Realty and on that basis the Authority does not have jurisdiction to investigate her claims further.

Costs

[32] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[33] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Eastern Realty may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Selwood will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[34] Having regard to the nature of the matter and the procedures involved, the parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” using a starting point of not more than a half day. That would be subject to any circumstances or factors, requiring an adjustment upwards or downwards.⁵

Rowan Anderson
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1