

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Robin Semmens (Labour Inspector) (applicant)
AND	SDP Call Centres Limited (respondent)
REPRESENTATIVES	Natasha Szeto for the applicant No appearance by or for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 26 October 2006
DATE OF DETERMINATION	27 October 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In an application brought on behalf of Ms Judith RakuRaku, Mr Robin Semmens (a very experienced and longstanding labour inspector employee of the Department of Labour), seeks a determination that Ms Rakuraku was an employee and that she was thereby entitled to various payments for public holidays, unpaid minimum wages and outstanding annual holiday payments, and interest – statement of problem and amended statement of problem received on 6 June and 3 October 2006.

2. The Company has never filed a statement in reply despite requesting by fax received on 21 June – and being granted – an extension of time for that purpose.
3. The parties underwent mediation.
4. In a subsequent telephone conference on 13 September convened with Mr Semmens and the respondent's then counsel, Mr Fintan Devine, the parties agreed to a one-day investigation in Wellington on 26 October 2006. During that conference Mr Semmens advised of his intention to file an amended statement of problem and the changes it would incorporate. During that conference Mr Devine advised he had limited instructions, that there might not be a statement in reply, that the Company was in the process of being wound up and he was unsure if any funds would be available for creditors. Mr Devine did agree to the respondent filing its witness statements by 12 October but as it happened no statements have been received from the Company.
5. In faxed advice received just prior to the investigation Mr Devine reiterated his earlier advice that the Company has negligible assets. He also advised it had some outstanding creditors and was unlikely to operate again given the state of health of its director, Mr Arthur Sanford. The Company was not in a position to engage Mr Devine to represent it at the investigation. Because of Mr Sanford's health he was unable to analyse the amended statement of problem or prepare for the investigation. Mr Devine advised that Mr Sanford was going into hospital the following day and would not be able to attend the investigation. Mr Devine expressed the closing view that, *"It does seem in the interests of justice that Mr Sanford is given the opportunity to present the company's position but his state of health at present not allow him to."*

Decision to Proceed with the Investigation

6. I did not accept it was unfair to proceed with the investigation set down for 26 October: ss 160 & 173 of the Act applied. That is because this matter was drawn to the Company's attention well in advance of the mediation it attended on 24 March 2006. Ms RakuRaku's employment relationship problem was further set out in the statement of problem received on 6 June. Despite being given, at its

request, more time to complete a statement in reply, the Company failed to put its side of the story. The Company similarly had ample opportunity following the Authority's (and its) receipt of the amended statement of problem dated 3 October to address Ms RakuRaku's concerns: it did not. The Company also had, at the same time it received the amended statement of problem, the witness statements from the applicant and Mr Semmens: it similarly elected not to respond to the allegations set out in those statements. The age of Ms RakuRaku's concerns and the absence of medical records in respect of Mr Sanford and any prognosis of when he might be fit to participate in an investigation, and the advice as to the Company's parlous trading position, defeat the implied request that matters be held off because of the respondent director's health.

Background

7. I am satisfied from the Authority's investigation that I am able to make the following relevant findings.
8. Ms RakuRaku worked for the Company as a telephone operator/telemarketer from 12 March 2002 until the business closed on 8 September 2006. At all times she worked at the Company's Adelaide Road, Newtown premises.
9. Ms RakuRaku's role was that of seeking donations by phone from the public for charitable organisations. She received 20% of the donations she personally generated. All operators had to work from the Company's premises because of the arrangements with Telecom for special toll rates.
10. While there was an opportunity to select shifts and thereby vary work hours, the applicant worked set work patterns virtually from the commencement of her employment, i.e. the morning and afternoon shifts, Monday to Friday as long as they were available.
11. There were 3 shifts a day, 9-1 p.m., 1-5 p.m. and 5-9 p.m. Operators were allocated pre-selected pages copied from regional telephone directories and were required to go down the list and call every number listed on the page.

12. Ms RakuRaku was interviewed for the position by Mr Sandford. She does not recall the type of application form she may have completed but does remember being told her remuneration was entirely commission based. Ms RakuRaku says that, while she was told she was responsible for her own ACC levies, at no time during the interview was she told she was self-employed. The applicant did not sign or receive any form of employment agreement or contract. Ms RakuRaku understood she was entering into a standard contract of service with the Company.
13. Ms RakuRaku was paid on the 1st and 16th of each month by crossed cheque. She was not required to invoice for her services.
14. Very little changed throughout her employment: Ms RakuRaku worked regular hours Monday to Friday, did the same work at all times and the commission rate was unvaried.
15. During her employment with the Company she received a number of directives from Mr Sandford on various subjects, mainly addressed to all operators. It was Mr Sandford who set the rules and made decisions without consultation with staff (see attached exhibits to her witness statement). Ms RakuRaku had no say in when holidays were to be taken: they were at Mr Sandford's direction. She was, however, never paid any holiday pay by the Company.
16. Ms RakuRaku regards the Company's claim she and other operators were contractors to be a sham intended to deny her employment related benefits.
17. Mr Semmens' evidence explains how he investigated Ms RakuRaku's complaint of 21 June 2005 relating to her employment relationship with the Company. At the time the Department was investigating the circumstances around two ex-employees who were pursuing similar claims. The applicant was advised that an action was pending that might assist her claims, and that the Department was therefore suspending action on her complaint until the other cases were decided. As the statement of problem makes clear, their claims were eventually settled and recorded by way of a consent determination by the Authority on the ground "*that workers for (the Company) were construed to be employees*" (par 2 of the statement of

problem and refer par 5, clause 1, *McGowan v SDP Call Centres Limited*, WA 131/05, 15 August 2005).

18. Consistent with the express terms set out in the consent determination, Mr Semmens relies on the determination to support his claim that Ms RakuRaku was an employee and not a contractor.
19. The Department resumed its action on Ms RakuRaku's behalf on 10 November 2005. It met with the Mr Sanford on 16 November. The parties exchanged views and information. By letter dated 21 December the Department advised the Company it was of the view that Ms RakuRaku and other complainants were employees. The Department then received a fax from Mr Devine advising, amongst other things, of Mr Sanford's health problems. Mediation took place on 24 March 2006 but settlement was not reached. As the parties agreed there was room to negotiate further efforts were made to reach a settlement. A settlement document was prepared on 14 August 2006 and delivered to Mr Sanford for his agreement: it was never signed off.
20. Shortly afterwards Mr Sanford advised Mr Semmens of the Company's business difficulties, that it had few assets and was likely to be wound up.
21. Mr Semmens is satisfied that, despite the Company's use of the term "*self employed*", Ms RakuRaku was in fact an employee. This is because of the high level of control exerted by the respondent over its operators, the integral role of operators in the Company's business and the overall economic reality of the situation. He did not consider the operators, including Ms RakuRaku, to be running their own businesses. Accordingly, various payments owing to the Ms RakuRaku as an employee are sought.
22. Despite several requests to the Company for relevant records, including time and pay records, these have only been provided in a minimal form. As a result, Mr Semmens says he has been obliged to estimate arrears based on the minimum wage that are owed to the applicant, as well as her annual holiday and public holiday entitlements. He estimates those amounts to be:

- a. minimum wage claim: \$30,422.52
- b. public holiday claim: \$ 3,264.00
- c. annual holiday claim: \$ 5,461.20

Total claim for Ms RakuRaku \$39,147.72 gross

(refer to the calculations attached as appendixes to his witness statement)

23. Interest is sought on the holiday pay pursuant to s. 84 of the Holidays Act 2003.

Discussion and Findings

24. In respect of Ms RakuRaku, the applicant is seeking to recover minimum wages, annual holiday pay, plus interest, and public holiday pay under s. 228 of the Act, as well as costs. To succeed the Authority must find that Ms RakuRaku was in fact an employee of the Company.

25. Section 6 of the Act requires the Authority to:

- Determine the real nature of the relationship;
- Consider all relevant matters including intention;
- But not treat as determinative any statement by the persons that describes the nature of their relationship.

26. The Employment Court's decision, as endorsed by the Supreme Court, in *Bryson v Three Foot Six* [2003] 1 ERNZ 581 ([2005] 1 ERNZ 372 (SC)) now establishes the analysis to be undertaken in cases such as this.

27. They include consideration of the nature and form of any contractual document, control, integration, the fundamental or economic reality, taxation, industry practice and contractual intention.

Contractual Documentation

28. No written contracts were entered into by the parties in respect of their employment relationship. Ms RakuRaku is clear as to her intent in respect of that relationship, that it was a contract of service.
29. No evidence has been adduced by the Company as to its intent.

Control

30. The evidence as to the level of control exerted by the Company over the applicant comes from Ms RakuRaku and Mr Semmens. It is similarly not contested: it is that the applicant was subject to regular instruction from Mr Sanford, and therefore the level of control was significant.

Integration

31. In respect of integration, the evidence before the Authority points to Ms RakuRaku – along with other operators, via her regular shifts – being an integral part of her employer's business.

Fundamental or Economic Reality/Taxation

32. There is no evidence of Ms RakuRaku engaging herself to perform the services with the Company as a person in business on her own account (*Bryson*, above). The overall picture is clearly one of Ms RakuRaku being, effectively, a full-time employee of the Company.

Industry Practice/Contractual Intention

33. The Authority has no evidence of industry practice whereby telephone operators/telemarketers like the applicant are typically employed on a contract for services basis.

34. I have no reason to doubt Ms RakuRaku's evidence to the effect that, to the extent she turned her mind to the matter, she intended to enter into a contract of service employment relationship with the Company.

Conclusion

35. For the reasons set out above I have no doubt that the employment relationship between the parties was that of employer/employee, i.e. a contract of service.
36. It follows from that finding that Ms RakuRaku is entitled to the payments set out in Mr Semmens' evidence (refer par 21 above) including the interest that is sought on the holiday pay, pursuant to s. 84 of the Holidays Act 2003.

Determination

37. For the reasons set out above, I am satisfied that the applicant, Robin Semmens (labour inspector), has established his claim that Ms Judith RakuRaku was an employee of the respondent, SDP Call Centres Limited.
38. It follows that Ms RakuRaku is entitled to various entitlements and I therefore direct the Company to pay to her the following monies:

- a. minimum wages owing: \$30,422.52
- b. public holiday owing: \$ 3,264.00
- c. annual holiday owing: \$ 5,461.20

Total monies owing to Ms RakuRaku: \$39,147.72 gross

39. The Company is also to pay interest of 6% on the unpaid holiday pay from the date of the filing of the amended statement of problem ((3 October 2006) until date of payment of the outstanding amount.

40. The Company is also to pay the \$70 filing fee incurred by the applicant.

Denis Asher

Member of Employment Relations Authority