

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 281
3004611

BETWEEN ELLA SHEARD
 Applicant

A N D LAURA SANDS
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Danny Gelb, Advocate for Applicant
 Cherie Hainsworth-Powrie, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 12 July 2017 from Applicant
 02 August 2017 from Respondent

Date of Determination: 14 September 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment relationship problem

[1] The Applicant Ms Ella Sheard, claims that she was unjustifiably dismissed by the Respondent, Ms Laura Sands.

[2] Ms Sheard also claims that Ms Sands bargained unfairly with her and seeks a penalty in respect of breaches of the Employment Relations Act 2000 (the Act) and the Holidays Act 2003 (the HA).

[3] Ms Sands denies that Ms Sheard was unjustifiably dismissed and claims that she was not an employee but an independent contractor whilst working for her.

Issues

[4] This determination addresses as a preliminary issue whether or not Ms Sheard was an employee or an independent contractor whilst working for Ms Sands.

Note

[5] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on affidavits and submissions from the parties.

Background Facts

[6] On or about 7 October 2016 Ms Sands placed an advertisement on TradeMe. The advertisement was for an experienced Nanny and under the proforma heading: “*Type*” in the advertisement it stated: “*Part time Contract/Temp*”

[7] The advertisement stated:

... This position requires the nanny to get the children off to school each day with the associated tasks completed from approximately 7.30 to 8.30 a.m.

The after school care will require the nanny from 3.15 pm to approximately 6.30 pm each night. ...

This position is approximately 25 hours a week Please note that I do have some flexibility with the hours above.

The ideal candidate will be paid well for the flexibility required in this role with experience a must. ..

[8] Ms Sheard who had previously been employed in permanent positions, responded to the advertisement, and was interviewed by Ms Sands. Ms Sands states in her untested affidavit evidence that during the interview the parties discussed a contract for services in accordance with which Ms Sheard would invoice Ms Sands and be responsible for all her tax obligations including GST.

[9] Ms Sands in her untested affidavit evidence denies that there was any discussion during the interview that she would be employed as an independent contractor.

[10] After Ms Sheard had been offered and accepted the position of Nanny, Ms Sands emailed her a contract. The contract was headed: “*Independent Contractor Agreement for Ella Sheard – Nanny – Version Two*” and stated:

INDEPENDENT CONTRACTOR

The relationship of work is that of independent contractor and nothing expressed or implied herein shall constitute the relationship of employer and employee between the parties.

SERVICES

The contractor will deliver the services set out in the attached document 'Nanny requirements' and any services incidental to the Services, on the terms set out in this contract. ...

The parties agree the nanny is being employed at a minimum of twenty hours a week averaging over a two-week period (forty hours over two weeks). More hours will be as required.

A probation period will apply for the first three months to assess and confirm suitability for the position. ...

During the trial period Laura may terminate the contract, and the contractor may not pursue a personal grievance on the grounds of unjustified dismissal.

Reimbursement of Expenses

...the Contractor acknowledges that there is no entitlement to payment for injury, sickness, superannuation, holidays, redundancy.

[11] On 12 October 2016 Ms Sheard emailed Ms Sands stating:

...I just had a couple of questions after reading the contract thoroughly before I sign it.

1) In the trial period, I noticed that you have only given me 1 weeks notice, ..

2) 2) Just wondering why the notice period is 4 weeks, just wondering if I could cut it down to 2 weeks.

[12] The suggested changes were accepted by Ms Sands, and on 13 October 2016 Ms Sheard emailed Ms Sands stating: *"I am happy and good to go"*.

[13] Ms Sheard commenced working for Ms Sands on 25 October 2016.

[14] Copies of the invoices submitted by Ms Sheard were provided in evidence which set out the hours she worked each day which varied and setting out her mileage for reimbursement.

[15] The invoices did not state a GST number but included a space for entries identified as: *"Sales Tax"* although there was no amount entered against these spaces.

[16] Ms Sheard stated in her untested affidavit evidence that she had assistance from her partner's mother in drafting an invoice who also advised that she did not need to be GST registered as she earned below \$60,000.00 per annum.

[17] Ms Sheard also stated that: *"Laura made it clear to me after I started working for her that I was to pay my own tax ..."*

[18] Employer Monthly Schedules submitted to the IRD were provided in evidence in which Ms Sheard is noted as both the Employer and Employee and which confirmed PAYE payments.

[19] Ms Sheard also provided a Personal Tax Summary for the tax year 1 April 2016 to 31 March 2017 setting out tax earned during in that period, and noting herself as an Employer during the period she worked for Ms Sands from 1 November to 23 December 2016.

[20] Ms Sheard stated that Ms Sands had full control over the work she carried out, setting the hours she was to work and duties to be performed including:

- Family washing;
- Making breakfast;
- Helping the children with their homework;
- Making the children's beds;
- Helping with food preparation;
- Light housework; and
- Seeing the children onto the school bus.

[21] Ms Sands said that it had been agreed at the outset of the arrangement that Ms Sheard would have flexibility in the provision of the services required provided that her children's safety and interests were paramount. Start and finish times were flexible and to be worked around school hours and school activities although this was not mandatory.

[22] The contractual relationship ended on or about 9 January 2017 when Ms Sands telephoned Ms Sheard to advise her that she no longer required a nanny.

[23] In response Ms Sheard emailed Ms Sands on 18 January 2017 stating:

Hi Laura,

I hope you, Mike and the kids had a great xmas and a wonderful new year, just emailing to let you know I still have you are more than welcome to pop round after 6 pm to collect these.

I also wanted to thank you for giving me experience as a nanny for your 3 wonderful children,

Best wishes for the future

Determination

Was Ms Sheard an employee or an independent contractor whilst working for Ms Sands?

[24] In proceeding to determine whether Ms Sheard was employed by Ms Sands as an employee or an independent contractor I apply s.6 of the Employment Relations Act 2000 (the Act) which provides:

“s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the ... Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider any relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[25] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test),

¹ [2005] 1 ERNZ 372

which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[26] In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[27] Consistent with Ms Sands’ affidavit evidence that the contractual nature of the relationship had been discussed at interview, she had provided Ms Sheard with a written contract prior to the engagement commencing headed: *‘Independent Contractor Agreement’*.

[28] There are sections of that contract which indicate a contractual relationship: apart from the title, there is a clear statement in the clause headed *“Independent Contractor”* that the relationship is that of independent contractor. Notably that clause states: *“.. nothing expressed or implied herein shall constitute the relationship of employer and employee ...”*.

[29] There are also sections of the contract which indicate an employment relationship, notably the section concerning the trial period and the statement: *“During the trial period Laura may terminate the contract, and the contractor may not pursue a personal grievance on the grounds of unjustified dismissal”*.

[30] It is clear from the email trail that Ms Sheard was provided with the contract some 13 days prior to her first day working for Ms Sands, and therefore there was ample opportunity for her to seek advice on the content of the contract.

[31] Whilst I note there is ambiguity in the sections of the contract, Ms Sheard states in the email dated 12 October 2016 that she had read it thoroughly and did not query the statements regarding the nature of the relationship.

[32] I find this significant given that she stated in her affidavit evidence that she had worked positions of permanent employment on 3 previous occasions.

² [1993] 1 ERNZ 695

[33] Whilst Ms Sheard raised queries about the contract, these were concerning the trial and notice periods, and when her requests were confirmed as agreed by Ms Sands she confirmed by email dated 13 October 2016 that she was: “ ... *happy and good to go*”.

[34] Once the engagement commenced Ms Sheard submitted invoices, which is consistent with the nature of the discussion Ms Sands said had taken place at the interview.

[35] Ms Sheard states in her affidavit that her partner’s mother helped her to create an invoice and advised her that she did not need to be GST registered because her income level from her position with Ms Sands was below the income threshold.

[36] I find it significant that Ms Sheard felt the need to seek advice and that this indicates that Ms Sheard was aware that she needed to create invoices, not something she would have been expected to do as an employee and of which she would have been aware given her previous employment experiences. The discussion had also resulted in advice about invoicing for GST, again not a hallmark of an employment relationship, and of which she would have been aware.

[37] Given the discussion which must have resulted in this advice, I find it is significant that if Ms Sheard had any doubts about the nature of the relationship, she did not at that point query the nature of the relationship with Ms Sands as not being consistent with that of employment if that had been her understanding.

[38] The fact that she sought advice, albeit not from a legal perspective, and did not query the situation after receiving the advice instead acting upon it by raising invoices, I find indicates that she was aware that the nature of the relationship was contractual rather than that of employment.

[39] Consistent with the understanding Ms Sheard took steps to comply with the requirements of an independent contractor relationship not only by supplying invoices for reimbursement, but by submitting information to the IRD consistent with a contractor or self-employed status.

[40] I find that the contractual nature of the relationship, whilst having some ambiguity in the written contract, indicates that in practice Ms Sheard’s actions were in accordance with an understanding on her part that she was an independent contractor.

Control and Integration

[41] In examining whether Ms Sheard was an employee or an independent contractor whilst working for Ms Sands I note that Ms Sheard duties were those of a nanny to Ms Sands' children. Such duties necessitate working in the family home with a degree of intimacy.

[42] The duties Ms Sheard was to perform I find are consistent with the role of a nanny. Ms Sands' evidence is that Ms Sheard had her own key to the family home and could perform the services required in an average working period of 40 hours over a two week period.

[43] The advertisement for the position emphasized that there was flexibility in carrying out the duties and this flexibility would be recognised in the remuneration, stating: "*Please note that I do have some flexibility with the hours above*" and "*The ideal candidate will be paid well for the flexibility required in this role ...*".

[44] The contract states that the hours of work could be spread over a two week period which meant that Ms Sheard could spread her duties accordingly. This I find to be in accordance with the hours stated in the job advertisement which were qualified by the descriptor "*approximately*" and indicates that Ms Sheard had autonomy over when the duties were performed.

[45] Ms Sands states in her affidavit evidence that Ms Sheard had flexibility in deciding whether or not to perform the duties required and was not always available to undertake the duties as required. In addition she had the flexibility to take the children to engagements which were of a personal nature to her and to invoice for the petrol she had used on those occasions.

[46] This issue is not addressed by Ms Sheard in the Statement of Problem nor in the untested affidavit she submitted. However I note again that this would accord with the flexibility noted in the job advertisement.

[47] I find that these circumstances, whilst indicative, are not of themselves determinative of the true nature of the relationship and have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Ms Sheard was in business on her own account, the fundamental test.

The Fundamental Test

[48] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*³ that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*"

³ [2010] NZEMPC 1

[49] Ms Sheard has provided Employer Monthly Schedules submitted to the IRD and a Personal Tax Summary for the tax year 1 April 2016 to 31 March 2017. In both sets of documents she is identified as the Employer, not Ms Sands.

[50] Whilst Ms Sheard did not invoice Ms Sands in respect of GST, I note that her income for the financial year ended 31 March 2017 was below the income level at which invoicing of GST becomes mandatory for a contractor or self-employed person, therefore I do not find this fact to be determinative.

[51] At no stage during the period she worked for Ms Sands did Ms Sheard appear to question this situation as not being consistent with employment.

[52] Significantly I find Ms Sheard accepted a large degree of financial risk: she paid her own PAYE, and had no entitlement to the normal items which comprise terms and conditions of employment, specifically an entitlement to holiday and sick leave.

[53] Ms Sands states in her untested affidavit evidence that whilst Ms Sheard was working for her she was looking for other sources of income. There is no evidence from Ms Sheard to confirm this assertion, however I observe that the degree of flexibility provided would assist the possibility of such a step.

[54] Having considered all the circumstances. I determine that Ms Sheard was an independent contractor whilst working for Ms Sands.

Costs

[55] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[56] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority