IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 45
5572167

	BETWEEN	VIVIAN SMITH Applicant
	AND	MARK STEVENSON FIRST NATIONAL REAL ESTATE LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Kevin Murray and Shayne Boyce, Advocates for the Applicant Peter Churchman QC, Counsel for the Respondent
Investigation Meeting:	15 February 2016 in Blenheim
Submissions:	14 March 2016 from the Applicant 15 February and 15 March 2016 from the Respondent
Determination:	14 April 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. Vivian Smith was not an employee. The Authority does not have jurisdiction to consider her personal grievance claims.

Employment relationship problem

[1] Mark Stevenson First National Real Estate Limited (the company) engaged Vivian Smith as a property manager. She claims that she was unjustifiably dismissed and unjustifiably disadvantaged.

[2] Ms Smith claims that the respondent breached its duty of good faith to her by entering into a course of action that was likely to mislead and deceive her and by failing to be responsive and communicative.

[3] Ms Smith also alleges the respondent failed to comply with her request for time and wages records, her request for the reasons for her dismissal and failed to provide her with a written individual employment agreement.

[4] By way of remedy Ms Smith claims:

- lost wages and holiday pay amounting to $35,000;
- unpaid wages plus 8% holiday pay
- compensation of $80,000 for humiliation, loss of dignity and injury to her feelings,
- $5,000 rental commission,
- penalty of $20,000 against the company for breaches of the Employment Relations Act 2000 (the Act), and
- costs.

Preliminary issue

[5] The first issue I need to determine is whether Ms Smith was an employee at the time her alleged personal grievance occurred. If she was not the Authority does not have jurisdiction to investigate and determine her claims.

Determination

[6] When Ms Smith was first engaged in February 2013 she was not a licenced real estate salesperson. She studied and sat her exams to become a licenced salesperson. She was recorded, for the first time, as being a licenced salesperson on the Real Estate Agents Authority's public register on 3 April 2014.[1] Ms Smith's engagement with the company ended on 30 January 2015.

[7] Ms Smith bears the onus of establishing on the balance of probabilities that she was an employee. The relevant time or times to assess whether Ms Smith was an employee are when her claims arose, in particular, when the alleged personal grievances arose.

[8] Section 6 of the Act defines an *employee* as:

> *(1)(a) … any person of any age employed by an employer to do work for hire or reward under a contract of service, and*

[1] She voluntarily suspended her licence as of 25 February 2016.

> …
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
>
> *(3) For the purposes of subsection (2), the court or the Authority—*
>
> *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
>
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*
>
> *(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937.*

[9] Generally, the law requires the Authority to determine the *real nature of the relationship* between the parties.[2] That requires considering all relevant matters including any that indicate the parties' intentions.[3] Section 6(3)(b) of the Act states that any statement by the people involved describing the nature of their relationship is not determinative.

[10] However, because of s 6(4) of the Act, the direction not to treat parties' descriptions as determinative may not apply to Ms Smith's situation if the Real Estate Agents Act 2008 (REAA) applied to her.

[11] Ms Smith says that she never worked as a real estate salesperson and only undertook property management. She submits that means the REAA is not applicable to her and therefore the correct test for me to apply is that in s 6 of the Act.

[12] The company submits that the REAA provisions are paramount because of s 6(4) of the Act. It submits that despite Ms Smith not undertaking any property sales work when she was engaged by the company from 3 April 2014 she was a *salesperson* as defined in s 4 of the REAA.

[13] Section 4 of the REAA defines a *salesperson* to mean:

> *a person who holds, or is deemed to hold, a current licence as a salesperson under this Act.*

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[2] Section 6(2) of the Act.
[3] Section 6(3)(a) of the Act.

[14] I agree with Mr Churchman's submissions that from 3 April 2014, when Ms Smith held a current licence, she was a salesperson as defined by the REAA. Therefore, I need to consider what other aspects of the REAA applied to her.

[15] Section 51 of the REAA relates to the employment status of a 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. …*** [emphasis added]

[16] It is common ground that the written agreement entered into by the parties describes Ms Smith as an independent contractor.

[17] Submissions on behalf of Ms Smith focus more on the tests traditionally applied to assess the real nature of the relationship. At the investigation meeting, I heard evidence on matters related to the parties' intentions, the control and integration tests and the fundamental test.

[18] In addition, Ms Smith submitted that by telling her that under previous legislation property managers had to be licenced the respondent misrepresented the situation to her.

[19] The company submits that, because Ms Smith was deemed a *salesperson* and applying s 51(2) of the REAA, the written agreement is conclusive proof that Ms Smith was an independent contractor.

[20] Submissions for Ms Smith seek to rely on the Employment Court case of *Raine Blackadder Limited (t/a Ray White Commercial) v Noonan*[4] in which Judge Couch decided that Mrs Noonan had not been a salesperson as defined under the applicable law at the time, the Real Estate Agents Act 1976. Therefore, she had been an employee. Judge Couch decided that describing her as a salesperson made the contract between the parties illegal. That case is not applicable to Ms Smith's situation for three main reasons. First, the applicable legislative provisions are different. Secondly, Mrs Noonan was never a salesperson but from 3 April 2014,

[4] [2006] ERNZ 122

Ms Smith was. Thirdly, the written agreement between Ms Smith and the company did not describe her as a salesperson. The case does not bind me to follow its conclusions.

[21] The combined effect of s 51(2) of the REAA and s 6(4) of the Act is that Ms Smith was an independent contractor and not an employee. Therefore, the s 6 tests usually applied to assess whether someone was an employee are not relevant in Ms Smith's case. She was not an employee under the Act.

[22] Ms Smith cannot bring personal grievance claims to the Authority for unjustified dismissal or for three of the claimed unjustified disadvantages that occurred after 3 April 2014.

Claims related to the time before the written agreement was signed

[23] Two of the claims which are said to be unjustified disadvantage claims relate to the period before Ms Smith and the company signed their written agreement.

[24] They are the claims that the company adopted unfair bargaining, and required Ms Smith to enter into a contract for services knowing that would remove her from the Act's protections.

[25] In relation to the bargaining period, Ms Smith submits that she was misled by Ms Knudsen and Mr Stevenson either into believing that the company required her to become a licenced real estate salesperson or that it was a good idea to gain such a qualification, even if it was not a requirement. There appears to be a submission that during the negotiations that led to Ms Smith's engagement the company did not act in good faith.

[26] However, the duty of good faith only applies to parties already in an employment relationship, and not to applicants for a job.[5] The company was not bound to treat Ms Smith in good faith, as defined in the Act, when discussing her possible future engagement with it.

[5] *Hayden v Wellington Free Ambulance Service* [2002] I ERNZ 399

[27] As for the claim that the company required Ms Smith to enter into a contract for services knowing that it was removing her from protections contained within the Act; it is somewhat circular. There cannot be an unjustified disadvantage personal grievance arising in the time before an employment relationship was entered into. The claim appears to relate to what the company offered Ms Smith, which was a contract for services. This claim cannot succeed either.

Conclusion on employment status

[28] The real nature of the relationship between Ms Smith and the respondent, at least from 3 April 2014, was a contract for services. Therefore, the Authority has no jurisdiction to consider Ms Smith's claims that relate to the period from 3 April 2014. I cannot consider her claims for unjustified disadvantage, unjustified dismissal or for penalties for breaches of the Act.[6]

[29] The other two unjustified disadvantage claims relate to the time before the parties entered into any formal relationship and are also outside of the Authority's jurisdiction.

[30] The claims are dismissed for lack of jurisdiction.

Christine Hickey
Member of the Employment Relations Authority

[6] Even if Ms Smith was an employee over that time, I could not consider the penalty claims because the actions for recovery of a penalty were brought more than 12 months after the date when the cause of action first became known to Ms Smith, or should reasonably have become known to her – s 135(5) of the Act.