

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 153  
3001573

BETWEEN            ELLA VAN WIJK  
                                 Applicant

A N D                ULTIMATE DESIGN &  
                                 RENOVATION LIMITED  
                                 Respondent

Member of Authority:     Christine Hickey

Representatives:         Philippa Tucker, Counsel for Applicant  
                                 Hugh Matthews, Counsel for Respondent

Submissions:             At the investigation meeting

Date of Determination:    15 September 2017

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Ella van Wijk claims that she was an employee when she worked for Ultimate Design & Renovation Limited (UDR) and that UDR unjustifiably dismissed her.

[2] Her role as a telemarketer was to cold-call customers by taking numbers from the White Pages. UDR required telemarketers to generate appointment times as leads for its sales representatives to sell double-glazing to customers.

[3] Ms van Wijk suffered from illness in August 2016 and consequently was off work for at least three weeks. UDR terminated her engagement with it once she returned to work because she had not generated enough leads.

[4] UDR says it terminated Ms van Wijk's contract with notice as provided for under the contract. UDR says Ms van Wijk was never an employee, but was an independent contractor. Therefore, UDR says that the Authority has no jurisdiction to consider the personal grievance claim.

[5] This determination resolves the threshold jurisdictional issue of whether Ms van Wijk was an employee.

### **The relevant law**

[6] Ms van Wijk bears the onus of establishing on the balance of probabilities that she was an employee.

[7] Section 6 of the Employment Relations Act 2000 (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
- (b) includes –
  - (i) a homemaker;
- ...
- (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...**

(emphasis added)

[8] The law requires the Authority to determine the “real nature of the relationship” between the parties. That requires considering all relevant matters including any that indicate the parties’ intentions.

[9] The leading case in New Zealand that sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd*<sup>1</sup>.

[10] The Employment Court in *Poulter v Antipodean Growers Ltd*<sup>2</sup> summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- The Court must determine the real nature of the relationship;
- The intention of the parties is still relevant but no longer decisive;
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test;
- The fundamental test examines whether a person performing the services is doing so on their own account.

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<sup>1</sup> [2005] ERNZ 372

<sup>2</sup> [2010] NZEmpC 77 at [20]

[11] The starting point in determining the issue is to examine the terms and conditions of the contract and the way it operated in practice. Then I will apply the three tests known as the control, integration, and the fundamental, or economic reality, test, to gain an overall impression of the real nature of the relationship.

### **The parties' intentions**

[12] First, I need to explore how the relationship began.

[13] Ms van Wijk applied for a job advertised on Trade Me as a telemarketer. On 1 March 2016, Fordy Ratahi, an independent contractor acting as a sales representative for UDR, interviewed her. At her interview, he told her that the expected hours of work were Monday to Thursday from 4.30 pm to 8.30 pm in UDR's offices. He offered her a trial and so she worked for about four shifts between the 2<sup>nd</sup> and the 8<sup>th</sup> of March.

[14] Mr Ratahi says that when he interviewed Ms van Wijk he explained the differences between being an employee and a contractor. He says he also explained that UDR would deduct 20% withholding tax, but that she would be responsible to file a tax return at the end of the year and to pay her own ACC levies.

[15] Ms van Wijk remembers being told about how the job would work and that it was a contracting position. However, she says she did not really know what that meant and does not remember being told she would have to pay her own ACC levies.

[16] Mr Ratahi says Ms van Wijk told him that her mother would be able to help her because her mother was self-employed. However, Ms van Wijk denies that. She says that she did not know her mother was self-employed until August 2016 when her mother came to stay with her, during Ms van Wijk's illness.

[17] On 7 March, Mr Ratahi decided that Ms van Wijk showed sufficient promise to be engaged in an ongoing way. He offered her a role and gave her a copy of a "Contractor

Agreement.” He advised her to read it through, and if she wished to do so to sign it and bring it in on her first day. She did so and began working on 9 March 2016.

[18] Ms van Wijk says that she took the contract home with her and read it through. She noted that it was different from the employment agreement that she had received when she worked at Pak’nSave and Subway. However, she says she was still somewhat confused about what it meant to be a contractor.

[19] The contract provided:

- A The Company wishes to engage the Contractor as an independent contractor to perform the services. The parties acknowledge that the real nature of their relationship is that of independent contractor and principal and that the Contractor is in business his/her own account.
- B The parties have agreed that the Contractor will perform the services for the Company on the terms and conditions set out below.
- C This agreement replaces any other or earlier agreement or engagement that there may have been between the Company and the Contractor.

THE PARTIES AGREE as follows:

#### 1. CONTRACTOR’S APPOINTMENT AND OBLIGATIONS

1.1 The Contractor must perform the services set out in the schedule, or as otherwise agreed between the parties from time to time, in writing, (Services) during the term of this agreement.

1.2 The Contractor must, during the term of this agreement:

- (a) Perform the Services to the highest industry standards and so as to promote and further the interests of the Contractor and the Company;
- (b) Not delegate or have any other person perform his/her obligations under this agreement, or appoint any subcontractor, without the prior written consent of the Company;
- (c) Subject to the provision by the Company of specific equipment and resources, provide, at his/her own cost, all equipment and resources

necessary to enable him/her to perform his/her obligations under this agreement;

...

(f) Comply with the Company's reasonable directions and instructions in relation to the performance of the Services.

## 2. PAYMENT

2.1 The Contractor will invoice the Company on provision of the Services. The Company will pay all amounts payable under this agreement to the Contractor.

...

2.3 Invoices will be handed in to the Company on a Tuesday evening, for payment to be made by the Company the following Wednesday.

...

## 4. TERMINATION

4.1 The Company or the Contractor may give notice to terminate this agreement by providing 1 weeks' notice in writing to the other party.

...

4.2 The Company may terminate this agreement forthwith, by notice, if:

- (a) The Contractor fails to provide the Company with not less than 32 leads over a 4 week period;
- (b) The Services are not performed expeditiously and with all reasonable care, skill and diligence;

...

### 4.5 (sic) INDEPENDENT CONTRACTOR

5.1 The Contractor is an independent contractor and is not an employee or agent of the Company. The parties acknowledge that the real nature of their relationship is that of independent contractor and principal and that the Contractor is in business on his/her own account. The Contractor shall be responsible for the Contractor's own liability for tax, ACC levies, and all other liabilities and expenses, of whatever nature, relating to the Contractor. The Contractor hereby indemnifies and saves harmless the Company from all such taxes, levies and other expenses.

...

**Schedule 1****Services**

The Contractor must perform the following services:

- (1) Call prospective clients, and make good qualified appointments for the consultants to attend
- (2) Lead sheets to be filled in clearly and all information completed
- (3) Minimum of 8 leads need to be provided per week
- (4) Addresses & phone numbers to be double checked with clients when making appointments
- (5) The company must be represented in a professional manner.

As telemarketer leader you will be responsible for locking the building and alarming it at night, you will also enter all leads made that evening into workflow max. You must make sure phone numbers are entered correctly and the addresses are spelt correctly.

If you are unable to attend work, you must let the office know by 10am that day so we can make arrangements for someone else to lock up the building.

If there are any issues with any of the telemarketers you are to let management know without delay. You may also be asked from time to time to help supervise and train new telemarketer contractors.

**Schedule 2****Fees**

The Company will make the following payments to the Contractor for full performance of the services:

The Contractor will provide the Company with invoices weekly.

Invoices must be received on a Tuesday evening for payment on a Wednesday.

The agreed hourly rate for this contract is \$20. This is an all up rate and UDR will pay withholding tax on this amount.

[20] Ms van Wijk signed the contract on 9 March and started work immediately. The written terms of the contract evidences an intention that the relationship be a contract for services. Ms van Wijk agreed that she was told she had an opportunity to seek advice before

signing the contract. However, she did not do so. I note that there is no clause in the contract advising Ms van Wijk that she has the right to seek independent legal advice before signing it.

[21] Lena Mercer was UDR's Accounts Administrator when Ms van Wijk worked for UDR. She worked different hours to Ms van Wijk; they did not meet in person. Ms Mercer says that near the beginning of Ms van Wijk's employment she rang her for the first time to tell her she needed to put an invoice in, otherwise she could not be paid. She says that Ms van Wijk said she had not realised she needed to put an invoice in and wanted to know what the story was with holiday pay.

[22] Ms Mercer's evidence is that she explained in detail to Ms van Wijk that she would not get paid leave for holidays or sick leave or get paid extra for working on public holidays and that she would need to save a little bit from her weekly pay in order to be able to live on that money during holidays. That exchange demonstrates that even after Ms van Wijk signed the contract she did not fully understand it.

[23] Ms van Wijk denies that either Ms Mercer or Mr Ratahi ever had to ring her to remind her to get her invoice in so she could be paid on time. I find it more likely than not that she was reminded at least once to get her invoice in.

[24] Ms van Wijk says that although she did supply an invoice she saw it more as a timesheet.

[25] The signed contract clearly sets out the nature of the relationship that UDR intended to enter into with Ms van Wijk.

[26] Ms van Wijk signed that agreement and her agreement to the terms of the contract cannot be taken lightly. However, statements in the written contract that Ms van Wijk was not an employee, but an independent contractor, are not determinative of the matter.

## Further tests

[27] In the Employment Court case of *Cardy Business Limited v Bizaoui*,<sup>3</sup> Judge Colgan wrote:

No status case is ever completely clean-cut. Some elements of the parties' arrangements will favour one status, and others the alternative. The exercise is to weigh these factors to determine where the preponderance of them lies and, therefore, the nature of the relationship. Some factors are neutral: that is, they do not tend to indicate either the existence of contract of service or other arrangement, here a contract for services. Such factors will include arrangements entered into and performed that can be undertaken either by an employee or independent contractor.<sup>4</sup>

[28] In considering the factors below in the following tests, I weigh them to determine "where the preponderance of them lies." The tests assist me to establish whether the real nature of the relationship in practice varied from the position set out in the contractual agreement.

### *Industry practice*

[29] There was no evidence of industry practice so I cannot take that into account.

### **The control test**

[30] This test seeks to establish how much control UDR had over Ms Van Wijk's work.

[31] Ms van Wijk had to work hours and days set by UDR, and had to work from UDR's office. She could not work from a place of her choosing, or for the hours of her choosing. She was not able to work longer hours than those prescribed by UDR. These factors are suggestive of the type of control exercised in an employment relationship.

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<sup>3</sup> (2005) 2 NZELR 245

<sup>4</sup> *Cardy*, footnote 3, at paragraph [43].

[32] Ms van Wijk had to follow a prepared script. Ms A, a UDR employee who Ms van Wijk considered her supervisor, trained her in how to make the calls and how to follow the script. At times, the script changed and Ms A presented a new one to Ms van Wijk. I accept that cold calling roles often utilise a script, and that does not necessarily make the role one of employment. I consider that in all the circumstances the use of a prescribed script is neutral.

[33] Ms A was present during shifts from time to time and provided feedback and coaching to Ms van Wijk and the other telemarketers on how they were doing. This factor is slightly suggestive of an employment relationship.

[34] Ms van Wijk had to clock in and clock out of every shift, and attach the printouts of her time clock records to the invoices she had to provide. If Ms van Wijk or other telemarketers were late to clock in or left early, they were told off. Although leads generated by appointments being made was the result UDR sought, its strict management of the time worked is more suggestive of an employment relationship than an independent contracting relationship.

[35] Although she may not have been instructed to do so, Ms van Wijk filled in and gave Ms A a UDR leave request form when she wished to take leave to go to Australia on holiday. Ms A did not tell her she did not need to apply for leave because she was an independent contractor. Ms van Wijk's evidence is that another telemarketer who was engaged on the same terms and conditions as her filled in a leave request form. However, this does not support a view that the relationship was one of employment. It was possibly a way of collecting information on when the telemarketers planned to be away. There was no suggestion from Ms van Wijk that UDR could have refused her leave on the dates she planned.

[36] It is unclear who told Ms van Wijk that she should gain medical certificates when she was off sick and who gave her the email address of a person, who was apparently the factory manager, to send them to. That may have been Ms A. The available evidence shows that Ms van Wijk sent at least three medical certificates by email through to UDR and advised

Ms A by text that she was sending the medical certificates. Ms A did not tell her she did not need to send medical certificates and that the email address was for the factory manager, and not someone responsible for the telemarketers.

[37] Ms van Wijk's belief that she needed to provide medical certificates, and the fact the belief was not corrected when she did supply them, suggests that at least someone in UDR who had some responsibility for the telemarketers had the understanding Ms van Wijk was required to provide medical certificates. On balance, that is suggestive of an employment relationship, although not strongly so. It may be that given UDR's requirement that telemarketers provided a minimum of eight leads a week it would take into account genuine certified illness as a reason not to terminate a telemarketer's engagement if they were unable to generate the leads due to that illness.

### **The integration test**

[38] This test seeks to establish how integrated Ms van Wijk was to UDR's business. Some of the same factors considered under the control test are also relevant to this analysis.

[39] Ms van Wijk worked from UDR's office and used UDR's equipment. Clause 1.2(c) required Ms van Wijk to provide some of her own equipment and resources to do the role. However, that was never going to be the case. In fact, UDR provided all necessary equipment and resources. Ms van Wijk only had to be responsible for getting herself to and from UDR's offices.

[40] Ms van Wijk was required to introduce herself as representing UDR when making calls to potential clients. This is a neutral factor as that would equally be required of contractors or employees engaged in that kind of work.

[41] Ms van Wijk's work as a telemarketer was integral to UDR's business of selling double-glazing. This is suggestive of an employment relationship.

[42] In late July 2016, Ms van Wijk was promoted to being a telemarketer leader; her hourly rate went up to \$22 per hour. It was at that point that she became responsible for locking and alarming the premises at the end of the day. The responsibility of locking and alarming the premises is a neutral factor. All it shows is that UDR trusted Ms van Wijk to do so.

[43] However, from the same date she also became responsible for showing new telemarketers the ropes and answering their questions. Ms van Wijk also says that sometimes Ms A would ask her to watch a new person and report to Ms A on their performance. These factors are suggestive of an employment relationship.

[44] Ms van Wijk says that she understood she was required to let UDR know if she was sick and not going to be in at work. Mr Ratahi's evidence agrees with this, however, he says that was mainly as a courtesy to let UDR know that she would not be able to lock the premises, so UDR could get someone else to do it. I consider this a neutral factor.

#### **The fundamental test**

[45] This test is also known as the economic reality test. This seeks to establish, what Ms van Wijk's situation actually was; that is, was she in business for herself when working for UDR?

[46] **Invoices** – Ms van Wijk was required to put in invoices every week. She did not purchase her own invoice book. She found and used one in a cupboard in the UDR office. She and the other telemarketers assumed the invoice book was provided for their use. She was always required to work the same hours and so she was paid the same amount every week, dependent on her current hourly rate.

[47] Often the provision of invoices is suggestive of a relationship other than that of employer/employee. In this case, it is not strong evidence because the invoice had to be

accompanied by UDR's time clocking information. Because of that, it is a halfway house between a timesheet and a true invoice.

[48] **Ms van Wijk's tax position** – UDR deducted withholding tax and paid it to the IRD on Ms van Wijk's behalf. Withholding tax is a kind of tax that independent contractors pay. Ms van Wijk was not registered for GST, but she did not earn sufficient to take her to the \$60,000 per year amount after which she would have been required to register for GST.

[49] Mr Ratahi's evidence was that "years earlier" UDR engaged its telemarketers as employees on the minimum wage. Telemarketers used to be paid a bonus on top of the minimum wage, but it took three months for UDR to pay out the bonus.

[50] However, he said UDR decided to offer the telemarketers "an opportunity" to change to an independent contract to earn extra "up front" by increasing the hourly rate above the minimum wage. UDR started deducting withholding tax rather than the kind of PAYE that is deducted from employees. The nature of the telemarketers' work did not change.

[51] Mr Ratahi said that under the contracting arrangement some telemarketers now got "tax back from the IRD at the end of the year".

[52] Mr Ratahi's evidence about why UDR changed to having telemarketers as contractors and not employees does not really assist UDR's case. His evidence was that UDR decided to change how it could offer to pay telemarketers and did so. Telemarketers' duties, and how and where they carried them out and how they were required to record their hours did not change in any way, but they got a higher hourly rate, and some got tax rebates at the end of the year. Although a withholding tax arrangement is indicative of an independent contracting relationship, it is not determinative in these circumstances.

[53] Ms van Wijk received payslips showing her weekly payments from UDR, which were identified as "wages". The payslips also noted that PAYE was paid to the IRD, not that withholding tax, or schedular payments, were paid. UDR used a payroll provider who did not

distinguish between employees and contractors in the payslips or in “Employee Pay Summary” it provided as evidence. In addition, on Ms van Wijk’s bank statements payments from UDR were recorded as wages/salary. I consider Ms van Wijk was confused about her tax position, partly through how UDR and its payroll provider recorded the tax position, despite the terms of the contract.

[54] **Was Ms van Wijk in business for herself?** – Ms van Wijk had never been in business for herself. She is a young woman who had previously only worked part-time for Pak’nSave and Subway. She did notice that the kind of engagement she signed up to with UDR was different to the position she was in when working for those previous employers. However, it was her evidence she did not really know what that meant for her, and I accept that.

[55] Ms van Wijk was unable to increase the amount she earned with UDR by increasing the time she spent on calling potential customers. Mr Ratahi’s evidence was a little contradictory on this point. He said “in an ideal world” telemarketers could work fewer hours. He said if they got the required eight leads within, for example, two days of the week they would not need to work the other days or hours. However, he agreed that the “ideal world” did not exist and in reality, UDR enforced the required hours of 4.30 to 8.30 pm, Monday to Thursday. Mr Ratahi’s evidence was that telemarketers were limited to the hours UDR set; that is, they could not work other or longer hours in order to increase their income.

[56] Ms van Wijk was not able to hire any staff to undertake the services she had agreed to provide to UDR. This points slightly away from a contracting relationship.

[57] However, she was free to undertake other work, including other telemarketing work outside of the hours UDR required her to work even if the work was in conflict with UDR’s business interests, which tends to favour a contracting relationship.

[58] Overall, the evidence is not strongly indicative that Ms van Wijk was in business for herself.

## Conclusion

[59] Section 3 of the Employment Relations Act 2000 sets out the object of the Act to build predictive employment relationships by, among other things,:

(a) ...

(ii) by acknowledging and addressing the inherent inequality of power in employment relationships;

[60] In the Employment Court case of *Brunton v Garden City Helicopters Limited*,<sup>5</sup> Judge Travis wrote:

[84] As I have previously expressed, it is a very serious matter for either the Employment Relations Authority or this Court to find, notwithstanding the clear intention of capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually agreed, after those arrangements have terminated, that the real nature of their relationship was completely different.<sup>6</sup>

[61] In that case, Judge Travis decided that there was near equality in bargaining power, in part because of Mr Brunton's belief that his work as a helicopter pilot was so integral to the operation that if he resigned it would have the effect "of grounding the air ambulance service", and because Mr Brunton was a forthright person.

[62] In this case, Ms van Wijk and most of the other telemarketers were not highly skilled before they were engaged. Ms van Wijk had never held an outbound calling role. She brought her previous fast food industry customer service skills and her personal attributes, of which good verbal communication is one. However, it is certainly a stretch to say that she and UDR were in a near equal bargaining position. In addition, there are many indicators of the real nature of the relationship being different from a contract for services.

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<sup>5</sup> [2011] NZEmpC 29

<sup>6</sup> Above note 6, at page 520.

[63] Mr Matthews, for UDR, submitted that Ms van Wijk and UDR's relationship was analogous in some ways to the *Cardy* case<sup>7</sup>, in which the respondent was found to have been in a contract for service with Cardy Business Ltd. However, I consider the *Cardy* case distinguishable. In a number of ways, Mr Bizaoui and Ms van Wijk's situations were different. Unlike Mr Bizaoui, Ms van Wijk was not free to work from anywhere or at any time. Ms van Wijk and UDR's relationship was not an entrepreneurial one; she earned a fixed rate of pay for a fixed number of hours. Ms van Wijk was required to complete time records; Mr Bizaoui was not. UDR required a specific number of hours, unlike in Mr Bizaoui's case.

[64] Despite the signed contract, I conclude that the real nature of the relationship between Ms van Wijk and UDR was one of a contract of service; it was an employment relationship. Therefore, the Authority has jurisdiction to investigate and determine her personal grievance claim.

[65] The parties must attend mediation as soon as possible to attempt to resolve the grievance in good faith. If mediation does not resolve the claims please let the Authority officer know and I will hold an investigation meeting.

[66] Costs are reserved. I am confident the parties will consider costs in mediation. I note Ms van Wijk is receiving legal aid. If the proceedings are not resolved in mediation, I will deal with costs once the substantive matter has been determined.

## **ORDERS**

**A. Ella van Wijk was an employee of Ultimate Design & Renovation Limited.**

**B. The Employment Relations Authority has jurisdiction to investigate and determine her personal grievance claim. I direct**

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<sup>7</sup> Above, at footnote 3.

**the parties to mediation to seek to resolve the personal grievance.**

Christine Hickey  
Member of the Employment Relations Authority