

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 10/10
5143893**

BETWEEN MATS WICKBOM
Applicant

AND DRH (NORTHLAND)
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: K Taurau, counsel for applicant
E Midlane, counsel for respondent

Investigation Meeting: 8 October 2009 at Kerikeri

Additional information
provided: 23 October 2009

Determination: 15 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mats Wickbom has raised personal grievances against his former employer, DRH (Northland) Limited (DRH), as well as alleging other breaches of obligation.

[2] DRH denies there was an employment relationship between the parties. Accordingly this determination addresses whether the parties were in an employment relationship.

The facts

1. Introduction

[3] DRH operates a David Reid Homes franchise in Northland.

[4] Mr Wickbom and his family moved to Kerikeri in March 2007 to advance Mrs Wickbom's design business. Mr Wickbom began working as a real estate agent, but found business slow and sales difficult to come by. Meanwhile, though her own company, Mrs Wickbom had begun a business association with DRH providing design services for the new homes it built.

[5] At or about the end of 2007 or early 2008 there were discussions about a restructuring of the shareholding in DRH. The possibility of Mr and Mrs Wickbom obtaining a shareholding was canvassed, but did not go ahead. Instead a different shareholding was finalised, leading to the departure of two of the original shareholders and an opening for someone to carry out sales duties the shareholders had performed. In or about February 2008 this connection led Mr Wickbom and Kevin Stratful, a director and the general manager of DRH, to have discussions about Mr Wickbom's carrying out these duties.

2. The parties' agreement

[6] There was no written agreement. Mr Wickbom said the discussions led to an agreement that he begin employment with DRH on 19 March 2008 on the following terms:

- . the position was sales and marketing manager;
- . the workplace was the company's offices, and its show home;
- . hours of work were Mon – Fri 9 am – 5 pm, with 2 hours on Saturdays and Sundays;
- . the salary was \$65,000 pa, with a 1% bonus payable;
- . a company car would be available; and
- . a mobile telephone account would be paid.

(a) the position

[7] It was common ground that Mr Wickbom performed a sales role. His job was to sell David Reid-designed and built houses, and carry out associated duties.

(b) the place of work

[8] The base from which these duties would be carried out was the company's premises, although I understood from the oral evidence that it was common ground Mr Wickbom could and did work from home if he wished. In that respect his only obligation was to advise reception of where he was.

(c) hours of work

[9] Mr Stratful disputed that the hours of work were set as Mr Wickbom said they were. Mr Wickbom was to work as necessary in order to achieve sales, although he was expected to be present at the show home when it was open in order to provide a sales presence.

[10] The nature of the position, coupled with the acknowledgement that Mr Wickbom was not required to base himself at the company's premises, means I consider it unlikely that Mr Wickbom's hours were fixed beyond any obligation to be present at the show home.

(d) payment

[11] Mr Stratful also disputed that a 'salary' of \$65,000 per annum plus a bonus was agreed. He said Mr Wickbom suggested that the parties proceed on the same arrangement as DRH had with Mrs Wickbom's company, TR Designs Limited (TR Designs). He agreed to the suggestion. The agreement in both cases included an arrangement under which commission on sales would be offset against payments made pursuant to the retainer. Since no sales could be expected immediately, Mr Stratful agreed to pay Mr Wickbom's company, MOW Limited (MOW) a retainer of \$60,000 plus GST, with commissions being offset against that amount until they reached it. Thereafter payment would be by commission.

[12] Further to that, in a letter to Mr Wickbom's bank, dated 14 April 2008, Mr Stratful identified an expectation that 12 homes would be built in the next 12 months, as well as the payments TR Designs and MOW were expected to receive as a result.

It said Mr Wickbom was being paid a retainer, from which commissions were to be deducted. While the letter does not prove the terms of the parties' agreement, to the extent that it refers to retainer, commission, and MOW as it does, it supports Mr Stratful's account of the terms.

[13] Accordingly I consider Mr Stratful's account to be more likely and accept it.

[14] In practice TR Designs earned more in commissions than the amount of the retainer. MOW did not. Mr Stratful said that was why invoices from TR Designs were necessary, while MOW was paid regularly and in set amounts without invoice. Since I have accepted Mr Stratful's account of the remuneration arrangement itself, I also accept this explanation as it is consistent with that account.

(e) the company vehicle

[15] A company car signwritten according to DRH requirements was provided.

(f) the mobile phone

[16] DRH paid the mobile phone account.

(g) the role of MOW

[17] Mr Wickbom acknowledged that he discussed being responsible for his own tax payments, including GST. He also acknowledged that DRH paid the monies owed into an account in the name of MOW, although he denied MOW's involvement was his suggestion and said he acted as instructed in that respect.

[18] Overall Mr Wickbom's evidence was to the effect that he had only a passive involvement in the arrangement with MOW, and that there was no express agreement that his services would be provided to DRH through MOW.

[19] However from a tax and financial management point of view, the relationship proceeded as if MOW was contracting to DRH. MOW's accounts showed Mr Wickbom as a shareholder/employee of that company. Mr Wickbom did not protest

at the outset, or subsequently seek to change or correct the arrangement. Moreover he also had an extensive background in business management, with his more recent activity being in selling real estate as an employee of his own company. He understood the difference between employees and contractors.

3. The relationship in practice

[20] The working of the relationship in practice has been addressed in the above.

Whether the relationship was one of employment

[21] In determining whether the parties' relationship was one of employment I apply s 6 of the Employment Relations Act 2000, which provides in part:

“6. Meaning of employee

- a. ...
- b. 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.
- c. For the purposes of subsection (2) the Court or the Authority –
 - i. must consider all relevant matters, including any matters that indicate the intention of the persons, and
 - ii. is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

[22] I also apply the following passage from the judgment of the Supreme Court in **Bryson v Three Foot Six Limited (No 2)**¹:

“ ‘All relevant’ matters certainly include 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 the 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

¹ [2005] 1 ERNZ 372

fundamental test), which were important determinants of the relationship at common law. It is not until the Court or 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 tests.”

[23] Regarding the parties’ intentions, I find there was an agreement that the contracting parties be MOW and DRH. Since I also find Mr Wickbom understood the implications of such an arrangement, I find the parties intended that there be a relationship of principal and contractor between MOW and DRH.

[24] I turn to the well-known determinants of the nature of a relationship at common law.

[25] It is not in general unusual for sales positions to be constrained by rules imposed by the principal in order to support and maximise sales, and present the required image of the relevant product to the market in which it sells the product. This was more so here as the principal was a franchisee, which had associated obligations to the franchisor. To the extent that Mr Wickbom was obliged to act within those constraints, and in particular to operate using the name, materials and sales techniques of David Reid Homes, I do not accept there was a degree of control indicating the existence of an employment relationship.

[26] In addition it is not unusual to expect communication and co-operation between the parties regarding their movements and intentions. I do not accept there was more than that here. As noted, Mr Wickbom could and did work from home if he wished.

[27] I do not accept that Mr Stratful gave instruction to Mr Wickbom about how he was to carry out his duties beyond what was necessary to provide product details and information about DRH sales procedures, and to support Mr Wickbom when he was new to the position.

[28] For the above reasons, I do not believe the integration test assists here.

[29] Another commonly-used test requires an assessment of whether the individual concerned can be said to be in business on his or her own account. It is difficult for

people employed by their own companies to mount a persuasive argument that they are not in business on their own account. This is because it can be said that their own company is in the business of selling their services (which are usually of a specialist kind), they have chosen to structure their affairs in that way, and must be bound by the consequences. I do not depart from this in Mr Wickbom's circumstances, and find he was in business on his own account.

[30] In conclusion, and for the above reasons, I find there was no employment relationship.

[31] This finding means that the Authority cannot proceed to determine the substantive matters Mr Wickbom has raised.

Costs

[32] Costs are reserved.

[33] The parties are invited to agree on the matter. If either party seeks a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority