

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jiang-Dong Wu (James) (Applicant)
AND Hamilton Holdings (2002) Limited (Respondent)
REPRESENTATIVES Jiang-Dong Wu (James) In person
Barry and Christine Hamilton, Advocates for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 14 November 2006
DATE OF DETERMINATION 30 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jiang-Dong (James) Wu says he is owed unpaid commission payments by his former employer, Hamilton Holdings (2002) Limited, trading as Century 21 Countrywide Real Estate Waiuku (“HHL”).

[2] HHL denies any payments are owed and says that in any event Mr Wu was a contractor, not an employee.

[3] This determination addresses whether the parties were in an employment relationship or a relationship of principal and contractor.

The parties’ agreement

[4] Mr Wu completed the necessary training courses, and obtained certification as a real estate salesperson, between October and December 2004. He told me he did that because he wanted to sell his house and wanted to understand how the sales process worked. He needed what he called an assessment for the purposes of one of his courses, so sought to approach a real estate agent with whom he had dealt several years earlier to assist him with the assessment. His attempts to contact that person led him to the Century 21 office at Waiuku. The person concerned was no longer there but Barry Hamilton, husband of the owner of the business, offered to help.

[5] Mr Wu alleged that Mr Hamilton invited him to work for the business, which is true in part but Mr Hamilton also advised Mr Wu he would need an interview with the owner, Christine Hamilton.

[6] An interview with Mrs Hamilton was duly arranged in or about November 2004.

[7] Mrs Hamilton said she told Mr Wu:

- (a) the position was a commission-only position;
- (b) he would be paid commission when sales had become unconditional;
- (c) the commission system meant there could be a period of up to 3 months before he received any income;
- (d) he would be expected to work ‘floor time’ in the office and there would be a lot of weekend work; and
- (e) it would be a good idea to register for GST.

[8] Mr Wu was adamant in his denial that any of this was said to him. He did, however, say there was a discussion about who would pay his real estate salesperson’s registration fee (he would) and that Mrs Hamilton suggested he buy a new car. Since Mr Wu already had a car, he chose to use that vehicle.

[9] Mrs Hamilton also said that, a week or two later, she gave a written agreement to Mr Wu to sign. He did not sign it immediately, and she decided not to push him. The agreement contained the following provision:

“4. INDEPENDENT CONTRACTOR

It is agreed that you are engaged (and have always been engaged) as an independent contractor and not as an employee, joint venturer or partner of the company.”

[10] Mr Wu was again adamant in his denial that any such document was given to him, or that he had ever seen a written agreement applying to him.

[11] Mrs Hamilton was just as adamant in her evidence. She went on to say that, after Mr Wu had ceased his association with HHL, she found the agreement in the drawer of his desk. Mr Wu denied that he put it there, and denied any knowledge of its presence or how it got there. Mrs Hamilton believes it is the document she gave to Mr Wu.

[12] The conflict in the evidence about how Mr Wu spent his time during his association with HHL was just as marked. It was at least common ground that, in January 2005, Mr Wu was involved in securing an agreement for the sale and purchase of real estate in which an associate of his had an interest. That is the transaction on which Mr Wu’s claim for commission is based.

[13] Mr Wu did not negotiate or complete any other agreements for sale and purchase of real estate during his time at Century 21 Waiuku. According to Mrs Hamilton, he spent most of his time sitting in the office reading, before disappearing in July 2005 and not being heard from again until he sought his commission payment six months later.

[14] Mr Wu said he spent time in the office, as he was rostered to do in accordance with the ‘floor time’ requirement, and also spent time with contacts in the Asian community. He said he took time off to go to Taiwan in April and May 2005, and returned to Taiwan in November 2005 to January 2006. A one-page note headed ‘brief journal 2005’ purported to list Mr Wu’s activity in June and July 2005 – showing minimal activity beyond ‘office duty’. Aside from his travel and the indication that he began day classes in August, he did not provide any other account of his activities after July.

Determination

[15] There are a number of legal tests applicable to whether a person is an employee or a contractor. In 1989 the Commissioner of Inland Revenue applied those tests to certain individual

real estate salespeople and found them to be employees of real estate agents, not contractors. The matter went to court. The High Court upheld the conclusion that the salespeople were employees, despite the reliance on ‘industry practice’ and written agreements describing the salespeople as contractors.¹ The Court of Appeal came to the same conclusion, although it focussed on the scheme of the Real Estate Agents Act 1976.²

[16] That led to the passing in 1992 of an amendment to the Real Estate Agents Act. The amendment read in part as follows:

“51A

- (1) This section applies ... to a salesperson and a real estate agent at any time if –
 - (a) ...; or
 - (b) ... after the commencement of the Real Estate agents Amendment Act 1992, they agree expressly that the relationship between them at that time should be that of employer and independent contractor.
- (2)...
 - (5) At a time after the 31st day of March 1992 when this section applies to a salesperson and a real estate agent, the salesperson shall for all purposes be deemed to be engaged by the agent under a contract for services.”

[17] The effect of the amendment is that, if the parties expressly agree that their relationship is one of ‘employer’ and independent contractor, then that is treated as the case even if the application of the legal tests might otherwise lead to a different result. Section 6(4) of the Employment Relations Act 2000 preserves that arrangement. If I am satisfied that there was express agreement between Mr Wu and HHL that the relationship be one of ‘employer’ and independent contractor, then I will find there was no employment relationship.

[18] There is no obligation that the agreement be set out in writing, only that it be express. However the existence of a written agreement is strong evidence that the necessary agreement was expressly reached.

[19] Mrs Hamilton relied in part on the discussion she said she had with Mr Wu to the effect that the position was a ‘commission only’ position. ‘Commission-only’ is not synonymous with ‘contractor’. There are many commission-only salespeople across industries. That method of remuneration is not determinative of whether an individual’s status is that of employee or contractor, although in practice many commission-only salespeople operate as contractors and that status is accepted. However, as happened in the real estate industry itself in 1989 and 1990, some commission-only salespeople are found to be employees. If it is challenged, the true nature of the arrangement is determined by applying the legal tests.

[20] The tests include: whether the person can be said to be in business for him or herself, and the nature and degree of control the principal exercises over the work of the person. Further, s 6 of the Employment Relations Act provides in part:

“(2) 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) ... the Authority –

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

¹ **Challenge Realty Limited v Commissioner of Inland Revenue** [1990] 3 NZLR 42 (HC)

² **Challenge Realty Limited v Commissioner of Inland Revenue** [1990] 3 NZLR 58

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

[21] While I do not accept Mr Wu’s denial that commission-only payment was discussed, nor do I accept that the discussion amounted to an express agreement that the relationship be one of principal and contractor rather than employer and employee in terms of the Real Estate Agents Act.

[22] An opportunity to correct that state of affairs came with the presentation of the written agreement.

[23] Mr Wu denied any knowledge of the written agreement. I am afraid I found that, and his generally wide ranging denials, quite incredible. I cannot accept, for example, that he would have started work for someone without having discussed or sought to discuss such basic matters as what or how he would be paid. He said he was naïve but I do not believe that is the case. His denial that material even of that kind was discussed at the initial interview has cast doubt on his other denials. I do not accept them. Accordingly I accept Mrs Hamilton’s evidence regarding the initial interview and the production of the written agreement.

[24] However there was nothing to suggest that Mr Wu’s attention was drawn to clause 4 of the agreement, or there was any discussion of the nature of the employment when Mrs Hamilton handed the agreement to Mr Wu. Mr Wu was simply given the agreement, and it appears that neither party did any more about it.

[25] Section 51A requires express agreement that a relationship be one of principal and contractor. The above matters mean there was no evidence of any express agreement. Accordingly s 51A does not apply.

[26] That in turn means I must apply the usual tests, including s 6 of the Employment Relations Act, to identify whether the relationship was one of employment. Regarding the parties’ intentions, Mr Wu’s failure to respond to anything in the agreement given to him means I am prepared to imply or infer at least his acquiescence to clause 4, but s 6(3) says that is not determinative. It is merely a relevant factor, although it has some weight in favour of the relationship being one of principal and contractor.

[27] Another factor weighing in favour of the relationship being one of principal and contractor, although not strongly so, is the discussion about registration for GST. That suggests Mr Wu would be in business for himself, although I acknowledge he did not seek registration. I do not accept Mr Wu’s denials that the matter was discussed.

[28] Mr Wu’s use of his own vehicle also weighs in favour of the relationship being one of principal and contractor although, again, not strongly so. The same goes for his agreement to pay his salesperson’s registration fee.

[29] I now turn to the way the relationship operated in practice. Mr Wu’s general lack of the kind of activity expected of a salesperson was so extreme that it is most unlikely an employer would have accepted it without comment at the time. Moreover Mr Wu mentioned several times in evidence that his interest in real estate was based on an interest in understanding his own real estate transaction, and a desire to help his friend with his real estate transaction. He also referred to his interest in improving his English by speaking with people. These things are consistent with short term personal interests, but not with the wider loyalty and commitment which is part of an employment relationship.

[30] On balance I conclude that Mr Wu was not an employee of HHL. The Employment Relations Authority does not have jurisdiction to hear his claim for unpaid commissions and will take the matter no further.

Costs

[31] Costs are reserved. If the parties seek a determination from the Authority on the matter they should file and exchange statements setting out what they seek, and why, within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority