

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 367/07  
5050621**

BETWEEN LYDIA ZAICEK  
Applicant

AND CIRCLE FINANCIAL MANAGEMENT  
LIMITED  
Respondent

Member of Authority: Leon Robinson

Representatives: Mark Ryan for Applicant  
Mark Nutsford for Respondent

Investigation Meeting: 22 May 2007

Submissions received: 7 June 2007  
14 June 2007

Determination: 23 November 2007

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Ms Lydia Zaicek ("Ms Zaicek") says she was unjustifiably dismissed from her employment with Circle Financial Management Limited ("Circle"). Ms Zaicek was first engaged by Circle in June 2004. Her "engagement" came to an end on 22 May 2006.

[2] According to Ms Zaicek, on 22 May 2006, Circle director Mr Mark Beckwith Saunders ("Mr Saunders") yelled at her in a rage allegedly because of the way she had spoken to a new office worker. Ms Zaicek says she told Mr Saunders *"that his behaviour around the new office girl was disgusting and resembled a dog on heat"*. As one would expect, that comment did not please Mr Saunders. Ms Zaicek says that Mr Saunders demanded she see him before she left for the day and that if she did not she should not bother returning to work. She says that five minutes later Mr Saunders and manager Mr John Snell ("Mr Snell") returned to her office and gave

her five minutes to pack her desk and leave and not return again. Ms Zaicek says she was owed \$16,375.00 in commissions when she departed.

[3] Mr Saunders has a different account of events. He says that it was brought to his attention that Ms Zaicek had had *"an absolute screaming match"* with another staff member while clients were present. He says that he calmly asked Ms Zaicek to see him in his office. He says that he told her that from what he had heard *"he needed to ensure [this] sort of behaviour was not tolerated and to make sure that there was no confusion he wanted to put it in writing for her"*. He says he then passed a written letter to Ms Zaicek. He says Ms Zaicek then rolled her eyes, threw the letter back at him and stormed out of his office screaming *"how ridiculous"* and telling him to *"fuck off"*. He says he politely asked Ms Zaicek to calm down and come back to him after ten minutes. After 30 minutes when she had not returned to him, he went to find her and emphasised to her that he needed to see her. Twenty minutes later when she had not returned to see him, he says he went back to her in the presentation room. He says that as he entered the room she started screaming abuse at him, calling him all sorts of "ugly" names including *"dog on heat"* and *"c...t struck"*. He says he refused to be spoken to in that fashion and as a result asked Mr Snell to manage Ms Zaicek's "exit".

[4] That "exit" is said by Ms Zaicek to have been an unjustifiable dismissal. She asks the Authority to resolve the problem by orders for reimbursement and compensation.

### The merits

[5] Circle says an exit was required because of Ms Zaicek's abusive conduct. It denies that Ms Zaicek was an employee and says that she was an independent contractor. It is necessary to first determine whether Ms Zaicek was an employee. That enquiry requires a determination of the real nature of the relationship between Ms Zaicek and Circle.

[6] The intention of the parties is relevant but is no longer decisive. Statements by the parties, including contractual statements are not decisive either. The real nature of the relationship can be ascertained by analysing the tests that have been

historically applied such as the control, integration and the fundamental test. The fundamental test examines whether a person performing the services is doing so on their own account. Industry practice is also of assistance but is not determinative of the primary question.

[7] Usually, it is only after the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, is it possible to examine the relationship in light of the control, integration and fundamental tests.

### ***The documents***

[8] Circle maintains that despite repeated requests Ms Zaicek failed to sign a contract recording the agreement reached with her. The contract referred to by Circle is a document entitled *Independent Contractor's Agreement* expressed to be made between *Circle Asset Group* (without more) as "the Company" and Ms Zaicek. There is no further specification of "the Company" but each page is headed with a logo and the name *Circle Financial Management Limited*. Intended to be annexed to the *Independent Contractor's Agreement* is a further *Commission Agreement*. There are also two other pages headed *Application as Contractor* dated 27 January 2005 but not signed, which states:-

*As a contractor with our Company you are not an Employee.(sic) therefore:*

#### *GST*

- *You are required to register for GST if your income from taxable activities (including commission income from [company name] exceeds \$40,000 in any 12 month period.*
- *If you are registered for GST you must supply our Company with a Tax Invoice when you receive a Commission from a Settlement. If you are not registered for GST, or you are going to register, proof of GST registration with the IRD is requested.*

#### *Withholding Tax*

- *Our Company is required to deduct Withholding Tax of 20% from your Commissions on Settlement. Please complete an IR330, ticking the WT box and writing 'Commission' unless you hold a valid Certificate of Exemption.*
- *You can apply to the Inland Revenue for a Certificate of Exemption (CoE) from withholding tax. Certificates of Exemption are valid for one year and must be renewed by 1 April each year. If you hold a valid CoE please provide this to our Company and we will ensure that withholding tax is not deducted from your commission payments.*
- *Both GST and RWT is also a method of payment.*

[9] The unsigned *Independent Contractor's Agreement* defines Ms Zaicek as "the Contractor". There is an *Engagement* clause which provides:-

2 *Engagement*

*The services of the Contractor are hereby engaged and the Contractor shall perform financial services for the Company.*

[10] There is also a *Nature of the Relationship* clause set out at clause 6 which provides:-

6 *Nature of Relationship*

*The relationship shall be deemed to be that of a registered company and a self employed contractor. The Contractor acknowledges that no other relationship has been expressed or implied. All matters relating to The Contractor's personal taxation (with the exception of the requirement for withholding tax as covered in the title page of this agreement), GST, ACC and any other bookkeeping matters shall be the responsibility of the contractor.*

*The Contractor acknowledges that as an independent contractor they have no authority to incur any obligation on behalf of the Company except upon the express written instruction of the Company.*

*No terms of this Agreement shall be construed as creating any employment relationship between the Company and the Contractor.*

[11] None of the above mentioned documents are signed by either party. Circle says Ms Zaicek failed to sign it after it made repeated requests of her to do so. However, both parties accept the documents broadly reflect the relationship in practice except however for Ms Zaicek's principle contention that she was an employee and not an independent contractor.

***Common intention***

[12] Ms Zaicek concedes that when she first commenced the engagement she was an independent contractor but she further says that from about September 2004 she "*began being treated as an employee*". So I find that the common intention of both parties was that Ms Zaicek was to be an independent contractor.

***The relationship in practice***

[13] Ms Zaicek conducted presentations of one to two hours with clients referred to her by Circle termed "property runs". At these presentations she explained to clients a methodology by which they could increase their financial wealth at retirement by

using equity leveraging to purchase investment properties. The presentations were conducted at Circle's offices in its presentation rooms. In terms of the documents, Ms Zaicek was contracted to "*present suitable Property Investment and Retirement Presentation to each and every lead provided by Circle*".

[14] Following the presentation, interested clients were then referred to a property consultant who would present the client with suitable investment properties for purchase. These properties were owned by another company related to Circle. Ms Zaicek was remunerated by commission pursuant to the terms of the *Commission Agreement* of \$1,500.00 when the client's agreement for sale and purchase became unconditional.

[15] Ms Zaicek says that she was not registered for GST. However, she presented Circle with invoices marked with a GST number. I note that her invoices from April 2006 are rendered by a limited liability company *Heart to Heart.co.nz* of which Ms Zaicek is the sole director and shareholder. That company was formed in November 2005.

[16] Ms Zaicek says there was an expectation that she would be available to work for Circle 24 hours a day seven days per week and that she was prohibited from pursuing work anywhere else. But she also refers to a roster system where she was rostered on for two days then rostered off for the next two and also rostered for each alternate weekend. Circle says that Ms Zaicek worked no more than 25 hours per week and it gives examples of other business activities undertaken additionally by some of its other sales people. It says Ms Zaicek worked whenever there were client appointments and presentations and that she never refused any referrals to her.

[17] Circle denies providing Ms Zaicek with her own office and says she simply used a presentation office. I prefer Ms Zaicek's evidence and I find that she was provided with an office at Circle's Emily Place premises, together with a computer, stationery, and business cards noting her position as a finance consultant. Circle's denial conflicts with its own documentation. The Commission Agreement says this:-

*1.14 Circle will provide an area for "The Contractor" including one desk, one phone line, and sufficient stationery and internet access for "The Contractor" to use for the day to day procedures of operating Financial Consultation services.*

*1.15 The Contractor' stationary and other office requirements must be approved by John Schell.*

[18] I accept what Ms Zaicek says that Circle was obliged to provide her with a minimum of 15 leads per month although the unsigned commission agreement refers to Circle providing *"up to a maximum of 14 Property runs to "The Contractor" per week"* and later *"Circle will use its best efforts to provide a minimum of 3 qualified clients per week to "The Contractor"*". I also find that Ms Zaicek reported directly to Circle director Mr Mark Beckwith Saunders ("Mr Saunders") and Mr Snell. I also find that by roster, Ms Zaicek worked alternate weekends delivering presentations to clients. I find too that she was also required to attend regular weekly meetings at Circle being both sales and performance meetings.

[19] Ms Zaicek says that during her engagement with Circle, she was placed under a significant degree of control. I regard Ms Zaicek's claim that she was required to be available 24 hours per day exaggerated, because I consider it most unlikely she would be expected to deliver presentations at 3.00am in the morning. Circle says Ms Zaicek also sold advertising for her friend's magazine. I accept that Ms Zaicek was expected to be primarily available during business hours and alternate weekends. She was also subject to the control of the roster at least in respect of the alternate weekend work. I accept her evidence that generally she and the other consultant Dave allocated six hours per day in the office.

[20] Ms Zaicek was given her instructions by both Mr Saunders and Mr Snell and she reported to them.

[21] Circle denies Ms Zaicek was required to attend performance review meetings but agrees it did hold weekly meetings with her in relation to the status of various client contacts.

***The control test***

[22] Circle prescribed the mode, content and style of presentations to clients. It also required Ms Zaicek to routinely be available exclusively for its work. It provided her

facilities and equipment for the day to day operating processes of financial consulting services. I do not agree with the submission that Ms Zaicek was free to come and go as she pleased. I find that there was significant control imposed on her. This control was exercised by Circle over Ms Zaicek's work and how and when she performed it. That degree of control over Ms Zaicek during her working day was significant and I conclude that such control was characteristic of an employment.

***Integration test***

[23] I find that Ms Zaicek's role as financial consultant was an integral part of Circle's whole range of financial services as provided by the various limited liability companies in the Circle group. Her role as financial consultant was not an adjunct position.

***Fundamental test***

[24] This question asks whether Ms Zaicek was in business on her own account as an independent contractor.

[25] To be paid commission and as Circle required, Ms Zaicek had to submit invoices to Circle. Ms Zaicek gives evidence that she was not GST registered. However, she submitted to Circle her invoices for payment marked with a GST number. She submitted invoices as she was required to do before she could receive her commissions. The requirement for invoices being the employer's initiative, it cannot then be said that such invoices evidence Ms Zaicek being in business on her own account. So I do not regard the invoices as evidence that Ms Zaicek was a person in business on her own account.

[26] Circle says that Ms Zaicek had direct control over the level of earnings she was able to achieve. It says that she was able to refuse to accept referrals and in such an event the client would be referred to another contractor. But it also submits she never refused any referrals. Circle says too that Ms Zaicek had her own mobile phone and paid for it herself. It says it did provide her with business cards but also says those cards showed Ms Zaicek's own cell phone number and not a direct dial number at its offices. It also says that she coincidentally chose to give presentations

at its offices rather than at clients' homes. It agrees that Ms Zaicek held an access card to its communal garage but says she did not have an access card for its offices.

[27] Ms Zaicek tells the Authority there was nothing she could do in her tenure with Circle to increase income. She denies being in business on her own account.

[28] Her earnings would have surely been entirely dependent on the number of property runs Circle referred to her. There is evidence that she did not refuse any referral and there is no evidence that she asked for more referrals. I conclude that her earning capacity was entirely dependent on what Circle referred to her and that her control over that situation was limited.

[29] The above analysis is my assessment of the situation up to April 2006. I consider there to have been a very significant change from that time.

***The advent of Heart to Heart.co.nz***

[30] From April 2006 Ms Zaicek submitted invoices to Circle in respect of her services from a limited liability company *Heart to Heart.co.nz*. Ms Zaicek is the sole director and shareholder of that company. The same GST number is shown on the *Heart to Heart.co.nz* invoices and the contact details for the company are those personally of Ms Zaicek.

[31] I do not consider the advent of *Heart to Heart.co.nz* was inconsequential. It heralded a significant change to the situation. Ms Zaicek introduced a new person, a corporate entity, into the equation. When she was asked about *Heart to Heart.co.nz* she said she set it up to "*do other business*" and "*other stuff as in hobbies*".

[32] *Heart to Heart.co.nz* is to be regarded as an entirely separate legal entity from Ms Zaicek. *Heart to Heart.co.nz* has its own legal personality. It rendered invoices from April 2006 to Circle in respect of Ms Zaicek's financial consulting. I find there was no discussion between the parties about the change in circumstances. Ms Zaicek simply invoiced Circle through *Heart to Heart.co.nz*. Circle paid those invoices, it did not question why another entity was charging it for Ms Zaicek's services. It was content to pay on the invoices and in doing so, I find that by performance, there came

about a contract between *Heart to Heart.co.nz* and Circle. After the April invoice, Circle thereafter paid *Heart to Heart.co.nz* in respect of Ms Zaicek's financial consulting. I find that Ms Zaicek was not a party to that contract but rather, she was *Heart to Heart.co.nz*'s agent. So from April 2006 Ms Zaicek had no direct contractual relationship with Circle and that is what I find.

[33] I do not accept that *Heart to Heart.co.nz*'s involvement was merely paying another at Ms Zaicek's direction for convenience purposes. The arrangement was more than that. Ms Zaicek was always free to apply funds from her previous personal invoices as she pleased. What is significant is that *Heart to Heart.co.nz*'s invoices are demands for payment to it. Such demands can only proceed on an entitlement to payment and that means there must be a contractual relationship.

[34] The involvement of a further party renders the imposition of a personal contract of service less likely. Because of my assessment on this aspect of matters, I am led to conclude that on 22 May 2006, Ms Zaicek was not terminated by Circle either as an independent contractor or as an employee. She could not have been, because she had no direct contractual relationship at all with Circle. It was the limited liability company of which she was director that did.

[35] For completeness, if my assessment of the implications of the advent of *Heart to Heart.co.nz* are incorrect, I also consider that company's involvement as evidence of Ms Zaicek's being in business on her own account, being as she was, the sole director and shareholder of the company. I would then consider Ms Zaicek was not an employee. I would also find that having arranged her affairs so as to be financially advantaged, I would not as a matter of equity and good conscience consider it just that she be declared to be something else because the initial intended status no longer suited her.

[36] Had Ms Zaicek succeeded in having the real nature of her relationship with Circle determined to be an employment relationship, I anticipate there would then have arisen a liability for income tax on an incremental basis. Parties who seek to have their relationships re-assessed as to its real nature ought to be aware of such consequences.

### The determination

[37] For all the above reasons, I decline to resolve this employment relationship problem by way of the orders sought by Ms Zaicek. **There will be no formal orders.**

### Counter problem

[38] By its submissions, Circle raises a counter-problem against Ms Zaicek. I decline to investigate that problem for it has not been properly raised by statement of problem and nor has it been the subject of mediation.

### Costs

[39] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nutsford is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Ryan is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson  
**Member of Employment Relations Authority**