

ORDER PROHIBITING PUBLICATION OF NAME OF THE DEFENDANT

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 217
EMPC 200/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for stay

AND IN THE MATTER OF applications for non-publication orders

BETWEEN KENNETH KARUNANAYAKE (ALSO
 KNOWN AS KENNETH ALEXIS)
 Plaintiff

AND FED
 Defendant

Hearing: 23 September 2022
 (Heard at Auckland)

Appearances: K Karunanayake, plaintiff
 Defendant in person

Judgment: 30 November 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] The Employment Relations Authority (the Authority) found that the defendant was an employee of the plaintiff and that she was owed \$658.80 (gross) for wages and holiday pay, together with interest from 12 August 2016 until the date of payment.¹

¹ *HWE v Karunanayake* [2022] NZERA 209 (Member Blick).

[2] The plaintiff challenges the Authority's determination as he says the defendant was not an employee, but an independent contractor. This judgment resolves that challenge.

The defendant answered an advertisement on Student Job Search

[3] The plaintiff is a real estate agent operating under the Harcourts banner.

[4] At all relevant times, the defendant was a university student. She saw an advertisement on the Student Job Search (SJS) website for a marketing and promotions assistant that had been placed on behalf of the plaintiff. The purpose of the SJS website is to advertise employment opportunities for students.

[5] The job details for the position were described:

JOB DETAILS

Location – Auckland, Auckland City, Auckland General (10 vacancies)

Job Type – Casual

Category – Marketing Assistant/Coordinator, Marketing & Communications

Listing Date – 13/07/2016

Start Date – 02/06/2016

Indicative Hours Per Week – 20

Hourly Payrate – \$15.25-\$15.25

SJS Job Number – 104043185

[6] The advertisement read:

MARKETING & PROMOTIONS ASSISTANT – CASUAL – WORK FROM HOME

JOB DESCRIPTION

As a Marketing & Promotional Assistant, you will be playing a vital role in talking to people about our outstanding service throughout the Auckland area over the phone or in the office. We are looking for a team of fun, energetic and dedicated individuals!

The job involves telemarketing. There will be a brief initial training period in Stonefields, but after that you may complete the work from home. The work will involve calling up homeowners for a brief conversation – generally no longer than a minute, so you can do quite a few at a time.

No experience necessary – Immediate start – Initial training will be provided.

To be successful you need to **enjoy talking to people and possess excellent and clear communication skills**. The ability to speak any other language (Hindi, Korean, Mandarin, Cantonese etc) would be advantageous but it is not a requirement.

The work is to be done in your own time, but the hours in which you would be expected to call homeowners are **5.30pm – 8.30pm weekdays, or from 9am – 8.30pm** on weekends. You will be given 100 names to call at a time, and once you have worked through these, the employer will give you another 100. Given the brief nature of the calls you're making, you could work through 100 in a day if you are efficient.

Payment is made via commission – for every lead you generate that leads to a successful appraisal, you will be paid \$300, and \$1000 upon an unconditional sale. Although it varies every time, on average you could expect to make 1 – 2 sales per 100 calls. **Because this is a commission only role, most students on student visas are ineligible for this work.**

Please note that there will be a short unpaid trial of no more than 1 – 2 hours, to determine your suitability and interest in the position.

[7] The defendant was open to the position as she had previously undertaken similar employment.

[8] The defendant met with the plaintiff to discuss the position, and the parties agreed to her taking it on. At this meeting, the parties did a role play of what was expected of the defendant, and she was given a script and a list of names and phone numbers for her to call. The defendant was to endeavour to get the people she called to agree to having their home appraised by the plaintiff. The hope was that they then would list their properties with him.

[9] In the discussions and emails that followed, the defendant advised the times that she expected to undertake the work, which were within the times identified in the advertisement. The defendant received further lists of names and numbers over the period June–July 2016.

[10] The defendant called the numbers, and three people agreed to having appraisals done of their homes. The defendant therefore considered she was due the \$300 success payment for each of these agreements.

[11] The plaintiff disagreed; he said that because he had not been able to obtain a listing from any of the people who agreed to an appraisal, there was no success and therefore no payment due to the defendant. The defendant received no payment for her work.

[12] In mid-July 2016, the defendant went to see the plaintiff to get further names to call and to discuss payment. At that stage, the plaintiff advised the defendant that he did not consider the arrangement was working and so he was not giving the defendant any more names. He did, however, offer her \$40 for petrol, which she declined. No other payment was made or offered.

[13] As noted, the defendant took the matter to the Authority; she has candidly acknowledged that she did not particularly care what her employment status was; she just wanted to be paid for her work and to stop the plaintiff from entering into similar arrangements with other people.

Issue is status

[14] The issue here is whether the defendant was an employee of the plaintiff. The hearing proceeded on the basis that, if she was an employee, she is due the sums detailed by the Authority.²

[15] Section 6 of the Employment Relations Act 2000 (the Act) relevantly provides that:

- (1) In this Act, unless the context otherwise requires, **employee**—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

...

² The defendant suggested she was due more than was awarded by the Authority, but no cross-challenge was filed.

- (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.

[16] Both parties referred to information provided on the Ministry of Business, Innovation and Employment (MBIE) website, which points to four tests:

- (a) the intention test – what did the parties intend?
- (b) the control versus independence test – who had the ultimate authority?
- (c) the integration test – to what extent is the person integrated into the business of the principal?
- (d) the fundamental economic reality test – was the person in business on their own behalf?

[17] Ultimately, based on the evidence presented, the question for the Court is: what is the real nature of the relationship between the parties? Nevertheless, the tests identified on the MBIE website and used by the parties are a useful framework through which to consider this case. The parties each pointed to factors that they said supported their respective positions.

The defendant was an employee and must be paid

[18] In the present case:

- (a) There is no written agreement and no conclusive evidence of a mutual intent. The main documentary evidence is the advertisement on the SJS website, which formed the basis of the engagement. That advertisement was clearly one for casual employment. As noted, the defendant had experience with similar telemarketing type jobs. In those jobs she was an employee and was paid more than the minimum wage. She assumed the role with the plaintiff would be similar.

- (b) The defendant worked from her own home, using her own phone and determined the precise hours she worked (within the envelope set out in the advertisement). However, that is not unusual and does not invariably point to a contractor arrangement. The plaintiff provided the defendant with a script and the list of numbers to call. In that way, he had control over the work the defendant did.
- (c) The work the defendant was doing fed directly into the plaintiff's business.
- (d) The defendant was unable to independently build a business. Once people had agreed that they would have an appraisal done by the plaintiff, he would attend to that and to any ongoing arrangements. The defendant's role ceased with her obtaining agreement from the resident that they would have an appraisal done by the plaintiff. She had no influence over whether the plaintiff was able to agree with the resident that the property would be listed. The plaintiff made much of the fact that some of the contacts turned out not to be interested in and/or able to sell their homes. However, the defendant was simply calling the numbers provided to her by the plaintiff.

[19] Although there are some indicia that point to a contractor arrangement, those are minor in the scheme of things. On balance, I agree with the Authority that the defendant was an employee of the plaintiff.

[20] Accordingly, she is entitled to the \$658.80 (gross), plus interest as awarded by the Authority, all of which has now been outstanding for some time. The Authority also ordered the plaintiff to reimburse the defendant \$71.56 for the Authority filing fee.

[21] That award (including the interest) and the reimbursement of the filing fee are to be paid to the defendant by the plaintiff within 14 days of the date of this judgment.

[22] The plaintiff also filed an application for a stay of the Authority's determination (effectively an application for a stay of execution). However, the Court proceeded to hear the case promptly, and the stay application was not progressed. For completeness, it is dismissed.

Both parties apply for non-publication orders

[23] Both the plaintiff and the defendant have applied for non-publication orders over their names. The defendant applied in the Authority but was unsuccessful (but her name has not been published pending resolution in the Court); the plaintiff did not apply for such an order in the Authority, and his name was published.

[24] The defendant was a university student when she answered the advertisement for the position. She worked for the plaintiff for a very short period. She is now embarking on her career. Although she currently has a full-time job, the defendant is concerned about the potential impact publication of her name would have on her future prospects of employment.

[25] She took the case principally to obtain payment for her work.

[26] I accept there is a general, fundamental principle of open justice and that there must be sufficient, compelling reasons for the making of an order of non-publication, displacing the presumption in favour of open justice.³ In this jurisdiction, the balancing exercise needs to be exercised consistently with the governing legislation. The Act recognises the object of building successful and productive employment relationships. It also recognises the inherent inequality of power in employment relationships and promotes the effective enforcement of employment standards.⁴

[27] Access to justice is another issue in this jurisdiction. A number of commentators, including both the Chief Judge of the Employment Court and the

³ *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] and [13]; and *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447 at [5].

⁴ Employment Relations Act 2000, ss 3 and 143(a).

previous Chief of the Authority, have noted a concern that the publication of a litigant's name in an employment case negatively impacts on future employment opportunities.⁵

[28] There is increasing recognition by the employment institutions that an employee's ability to pursue legal entitlements, particularly to minimum employment standards, without the fear that doing so may damage future employment prospects, is a factor of particular relevance to the balancing exercise when considering an application for non-publication. Such a consideration may mean that it is in the broader interests of justice to make such an order, notwithstanding the open justice presumption.⁶

[29] In the present case, there is no examination of the defendant's attributes as an employee. She has simply taken proceedings to enforce minimum employment standards. It would be contrary to the Act's objectives and to the interests of justice for her to face being adversely affected for doing so.

[30] The public interest is served here by explaining the circumstances of the defendant's employment and the outcome of the challenge. There is little if any broader public interest in knowing the name of the defendant.

[31] In the circumstances, the application for non-publication of the name of the defendant is granted.

[32] The plaintiff's position is different. Before the Court, he said he had no problem with his name being published but thought that, if the defendant got an order, why should he not?

[33] No other reason was given for his application, and there is no apparent basis for an order. The issues that arise with respect to the defendant do not apply to the plaintiff. His application for non-publication over his name is declined. This

⁵ *JGD v MBC Ltd*, above n 3, at [8]; James Crichton "Employment Institutions — an argument for reform" (Paper presented to the Marlborough Colloquium of the Society of Local Government Managers, Blenheim, January 2019).

⁶ *QDA v EKD* [2021] NZEmpC 139, [2021] ERNZ 610 at [130]; *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 40, [2021] ERNZ 123 at [2].

judgment will, however, be withheld from the Employment Court's website for 14 days from the date of the judgment.

No issue as to costs

[34] Neither party was represented, and accordingly, there is no issue as to costs.

J C Holden
Judge

Judgment signed at 11.30 am on 30 November 2022