

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 44A/07
ARC 89/06**

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

BETWEEN MATTHEW LANCE TONES
Plaintiff

AND 3D1 LIMITED
Defendant

Hearing: 2 August 2007
(Heard at Auckland)

Appearances: Matthew Young and Murray Osmond, Advocates for the Plaintiff
I D Matheson, Counsel for the Defendant

Judgment: 19 September 2007

JUDGMENT OF JUDGE C M SHAW

[1] In May 2006 Matthew Tones entered into an agreement for supply and resale of software with 3D1 Limited (3D1). In September 2006 3D1 terminated the agreement.

[2] Mr Tones brought a claim to the Employment Relations Authority alleging that he had been unjustifiably constructively dismissed. The Authority investigated the preliminary question of whether Mr Tones was engaged under a contract for services or as an employee. It found that, as he was not an employee, his dispute with 3D1 was outside the jurisdiction of the Authority.

[3] Mr Tones has challenged that determination. The matter was heard de novo solely on the question of his employment status with 3D1.

The law

[4] The test in s6 of the Employment Relations Act 2000 for determining whether a person is an employee was comprehensively discussed by the Supreme Court in *Bryson v Three Foot Six (No 2)*¹. The Supreme Court held that, in deciding whether a person is employed under a contract of service, the Court is to determine the real nature of the relationship between them. In doing so it is directed by s6 to consider all relevant matters including any matters that indicate the intention of the persons. It is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[5] All relevant matters include the written and oral terms of the contract between the parties which may contain indications of their common intention about the status of their relationship. It is also important that the Court 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 and the degree of control by the employer, the extent of integration of the employee into the business, and whether the contracted person has been working on their own account.

[6] I approach this case in terms of those principles.

The parties

[7] 3D1 provides three dimensional design software for resale through agents to professional shop fitters and kitchen manufacturers. Chris and Rose Adams, directors of 3D1, have been in the business since 1993 and now operate under two companies in a partnership. One of these, 3D1, was incorporated in 2005 to deal with the New Zealand side of the business. Their other related entities engage contractors as independent agents working outside New Zealand. They have never had employees working for them.

[8] In May 2006 Mr Adams placed an advertisement on a job placement website called seek.co.nz to find people capable of selling the 3D Kitchen software range.

Matthew Tones answered the advertisement. He had previously been employed first as a field representative and then State sales manager in Australia by another company which also marketed and supplied three dimensional kitchen design software. In that employment he was an employee but worked from his own home and/or his car. In April 2006 he incorporated a company in New Zealand called Chartered Business Solutions Limited of which he was the sole director and shareholder.

The position

[9] In response to Mr Tones's expression of interest, Mr Adams sent him an e-mail giving more detailed information about the position. This document, which is addressed to "*Prospective Sales Applicants*" describes the 3D1 product and then the position. Materially it states:

- The position offered is a permanent contract position. It will require the successful applicant to be self-employed and registered for GST.
- The initial maximum retainer was \$72,000 plus GST for 12 months for a minimum of 12 sales per year after which commissions is paid on a per sale basis.
- The costs of travelling is an expense paid for by the sales agent – likely to be around \$10,000 per year.
- Advertising is paid for by the company.
- The sales agent is to provide a reliable computer and broadband internet.
- The sales agents own their own territory (in this case the whole of New Zealand) which will be able to be sold as a going concern by the agents.
- The company would provide full training to agents and assistance at all times to agents via the internet or phone on technical issues.
- "*This becomes your own business*".

¹ [2005] ERNZ 372 at 386

The agreement

[10] Mr Adams later presented Mr Tones with a draft agreement in which 3D1 is referred to as the supplier. Mr Tones is named as the reseller who has the right to sell and support the agreed software for the term of the contract in the region of New Zealand. The reseller was to be paid a retainer plus GST. After 12 sales within each 12 month period, additional sales would attract a commission at a specified rate. All costs incurred by the reseller in gaining sales would be the responsibility of the reseller. The supplier was to be responsible for advertising costs.

[11] It was open to the reseller to choose to sell, lease, or provide hire purchase contracts to the end-user. The obligations of the reseller were to be active in promoting the agreed software and the agreement could be cancelled if the reseller did not show commitment to promotions and sales. There was an expectation of 12 minimum sales each year and a high level of client satisfaction. Any costs of training additional agents engaged by the reseller would be charged to the reseller. The reseller was to pay for the software in full in advance with each order made.

[12] The supplier's obligations were to supply the agreed software to the reseller promptly. The insurance risk for the software remained with the supplier until delivery to the reseller's nominated address. The supplier was to be given details of all sales for the purpose of client registration and so they could be surveyed for client satisfaction.

[13] The agreement could be terminated upon payment of a month's salary as notice in advance and all outstanding commissions.

[14] Clause 33 provided that in consideration of the granting of the licence, both parties agreed that nothing should create any contract of employment, partnership, or joint venture between the parties.

[15] The reseller did not become the owner of any intellectual property rights to the agreed software which remained the exclusive property of the developer.

[16] In the event that the supplier sold the 3D1 business, the reseller would not be entitled to any share of the sale proceeds but the supplier would ensure by contract with any new owner that the reseller maintained rights of supply granted under this contract. The contract specified that the region operated by the reseller was a commercial asset to the reseller which may be sold to another party subject to agreement by the supplier, as long as the purchaser had sufficient industry knowledge and sound business acumen.

[17] Mr Tones negotiated some changes to the draft which were largely recorded in e-mail exchanges. They concerned the provision of a vehicle to him; whether the reseller needed to be indemnified; and a clause to prevent 3D1 from employing other people to sell in New Zealand without Mr Tones's consent. Mr Tones did not query clause 33.

[18] Of these changes, the most significant one for this case is the vehicle. At Mr Tones's suggestion, Mr Adams adjusted the salary package so that 3D1 paid him a lesser retainer. Mr Tones took a salary sacrifice of \$12,000 per annum in lieu of providing his own vehicle. Instead, the \$12,000 was to be paid by 3D1 to its finance company in amortisation of the cost of financing the purchase of the car. He had an option to purchase it later.

[19] In the course of these negotiations, Mr Tones e-mailed Mr Adams:

... This morning I have met with a Lawyer to handle these matters properly and professionally and we wish to alter the contract only very slightly. He is working on it for me today and should have a revised draft ready for you late today. Negotiations on the vehicle are going extremely well to include a 3 year complete service and parts warranty. Details will be forwarded once I have settled on an agreement with the dealer. I will keep you posted and by Monday all should be ready full steam ahead.

[20] In evidence, Mr Tones said that his references to a lawyer were incorrect and that he had not taken legal advice. He accepted he had misled Mr Adams. Following the negotiations, Mr Tones and Mr Adams on behalf of 3D1, entered into a final agreement on 30 May 2006.

[21] Apart from these facts, most of which can be gleaned from the documentary evidence, Mr Tones and Mr Adams gave oral evidence about their intentions in entering their agreement.

[22] In his evidence-in-chief Mr Tones said that his understanding was, and has remained, that he was being offered a permanent position for a fixed term with a salary (retainer) including the salary sacrifice. He said it was never explained that there was a distinction between what he was being offered and normal employment in New Zealand. However, in cross-examination he accepted that he had not asked Mr Adams to clarify the distinction between being an employee and being self-employed because he knew what the difference was. He had a general understanding of how companies worked although he had never operated a business himself before coming to New Zealand nor learned about such matters. He accepted that he knew the agreement entitled him to employ staff.

The agreement in operation

[23] On 31 May 2006 Mr Tones sent his first invoice for payment to 3D1. It is in the name of Mr Tones's company, "*Chartered Business Solutions Limited*". It is described as a tax invoice. Under the heading "*Invoice Specifications*" it reads:

June Base Retention (\$72,000/12) - \$6,000

June Salary Sacrifice Option (\$72,000 - \$60,000/12) - \$1,000

[24] With GST added the total amount due was \$5,625. Payment was to be made to Matthew Tones at a specified bank account.

[25] Mr Tones supplied his own computer. Mr Adams provided some work related items for him including business cards in the name of "*matthew tones 3D kitchen*" with his mobile number, e-mail address, and 3D1 website address. Mr Adams also finalised the insurance details for the vehicle which made Mr Tones liable for full costs of uninsured repairs or replacement. The insurance cover schedule said that the car would be used "*as transport for our software sales person*". Mr Tones arranged for another person to be noted on the insurance policy because he was thinking of employing him later.

[26] Mr Adams also paid all the costs of a trip to Sydney for Mr Tones and his other resellers to attend a sales convention. Mr Adams explained to the Court that he regularly paid such costs for his resellers and all people related to his business just to help them. He believed Mr Tones was in financial difficulties when he began working and would not otherwise have been able to attend the trade show.

[27] Before he left for Sydney, Mr Tones lost his passport and applied to the Australian Consulate for a new one. On 28 June 2006 he e-mailed Mr Adams:

Chris,

My passport is not where to be found. I have spoken with the Australian Consulate General and they need a letter faxed from yourself specifying that I am self-employed reselling your 3D Kitchen product in New Zealand, and that I MUST attend the AWISA tradeshow of which occurs only once every 2 years. The letter needs to be dated & signed and specify that I must travel on Monday 03rd July 2006 and they will provide me with an emergency passport so I can attend the show! Frantic but must get it done. I have contacted [name] and she states the passport is not in Te Kuiti.

[28] At the tradeshow Mr Tones assisted with ideas about 3D1's presentation although most of the planning had already been done by other resellers much earlier. Mrs Adams recalled a conversation in Sydney with Mr Tones about the costs of attending the conference during which he referred to himself as an independent agent.

[29] Mr Tones's evidence was that, on returning to New Zealand, he travelled extensively in the North Island meeting his own travel costs. He had no set hours, visited the offices of 3D1 only once, and worked from his car or home. He drafted purchase agreements with two customers in the name of "*Chartered Business Solutions Limited trading as 3D Kitchen Limited*" in which he is described as "*National Sales Manager*". Mr Tones said he prepared these quotes earlier in the piece when he thought he was representing 3D1 and invoicing them through Chartered Business Solutions Limited. There was no evidence that this practice changed up until his agreement was terminated.

[30] Mr Tones said that he did not register for GST in his personal capacity but in cross-examination agreed that when Mr Adams told him he had to invoice for GST he had his company registered.

[31] He conceded in evidence that during the duration of the agreement with 3D1 he had only made two sales. These were for software upgrades for which he didn't present any invoices. He therefore made no sales, goods were never shipped to him, and he made no money from sales beyond the retainer agreed to in his agreement. He said that because he did not purchase any stock he had zero risk and any risk was borne by the defendant.

The plaintiff's case

[32] Mr Young submitted that, whatever the intention of the parties at the time of the agreement and its content, the true reasons for the defendant company wanting a reseller's agreement was to avoid the responsibilities and obligations of being an employer whilst acting like an employer in most respects. The agreement did not represent the true nature of the relationship nor did the parties act in accordance with it and was a sham.

[33] Mr Young correctly submitted that what should be considered is not the label associated with the relationship between the parties but the real nature of the relationship between them.

[34] It is the case for the plaintiff that he was looking for a permanent full time position and went in search of a job by responding to a job advertisement to find employment. The factors which Mr Young relied on in his closing submissions to support Mr Tones's claim of being an employee were the reference in the contract to the payment of a salary, the provision of a company vehicle, and the lack of any business risk to Mr Tones. Mr Young submitted any risk was borne by the defendant company.

[35] In addition to those submissions, Mr Tones alleged in his evidence that there were differences between the agreement and how it operated. These included:

- The definition of the territory defined in the agreement was not clear;

- The agreement refers to a package worth a total of \$72,000 plus GST and then in the following line refers to a total annual package being worth \$72,000 with no mention of GST.
- When the agreement was terminated Mr Adams did not refund the car payments which Mr Tones had made up to the date of termination as per the agreement and was in breach;
- The provision of business cards and travel expenses to conferences are not consistent with Mr Tones being an independent contractor.

Decision

Intention of the parties

[36] I have no doubt that the intention of both parties at the time they entered into the agreement was that Mr Tones was not an employee but would be running his own business independent of 3D1 either as an individual or under his company name. I find he was very familiar with the nature and express terms of the agreement having confidently negotiated at least two significant changes to it. If he had any difficulty about not being an employee he would have raised that then.

[37] Mr Adams's intention was embodied in the signed agreement. In addition, the job description he provided made it clear that Mr Tones was getting his own business and territory as part of the deal and that he could sell it.

[38] I conclude that both parties knew and intended at the signing of the agreement that Mr Tones was not an employee.

The agreement in operation

[39] I find that the evidence does not support Mr Young's submission that the agreement was a sham.

[40] The only aspect of the alleged differences between the agreement and how it operated in practice which are directly relevant to Mr Tones's employment status is

what materials were supplied to him by 3D1. If his employer were providing him with tools of the trade, this could be an indicator that he was not entirely independent.

[41] Given that Mr Tones's role was to resell the software across a wide territory, his most useful tool of trade apart from his own computer was the motor vehicle. That vehicle was supplied as part of his remuneration as a financial favour to him and, had the relationship lasted, would have ended up being his own vehicle paid for out of his salary sacrifice. It was not the same as an employer providing an employee with a vehicle for work purposes. Mr Tones paid for all fuel and maintenance on the vehicle.

[42] The other factors referred to by Mr Young are not indicative of employment status. The area of the territory in which Mr Tones was able to sell does not indicate one way or the other what his employment status was. In any event I find it was made entirely clear in the position description that it covered the whole of New Zealand. While Mr Tones obviously did not 'purchase' the territory, it is clear that he did have exclusive rights to make sales in that territory and that these rights were his to sell if he wished. To that extent he did carry a risk. The more successful his business, the more valuable it would be for the purposes of a sale.

[43] It was not clear what implication I was to take from the submission about the GST. If it were that it created confusion about his employment status, I cannot accept that. The agreement made it perfectly clear that he was to be paid a retainer plus GST. As his invoices show this is what happened. There was no discussion and no payment of PAYE personal tax.

[44] While Mr Adams accepted that he did not refund the car payments to Mr Tones when their relationship ended and that this may have been a breach of the agreement, that does not advance the evidence as to the employment status of Mr Tones.

[45] Although payments of travel expenses may be indicators of control and integration, they cannot be seen in isolation when the question for determination is

the true nature of the relationship. I accept Mr Adams's explanation of why he paid for the Sydney trip and other conference expenses. He was, I find, genuinely concerned to give his resellers the chance to become established in the business. It is consistent with the interests of 3D1 to have resellers happily engaged in promoting its products. The payment of the expenses to conferences was one which he provided for all of his resellers. It was outside their contractual terms and done as a gesture to them.

[46] Although Mr Tones attempted to portray himself as an individual engaged as an employee by Mr Adams, this does not accord with his sending out purchase agreement documents under his company name, Chartered Business Solutions Limited. This was a newly created company which he was going to use as a vehicle for his work for 3D1 in spite of signing the reseller agreement as an individual.

[47] There was no evidence at all that 3D1 was controlling Mr Tones and his selling beyond the terms of the reselling agreement.

Conclusion

[48] I find that none of the tests to be applied to ascertain whether a person is an employee has been established. There is no merit in Mr Tones's allegation that he was ever an employee or even treated as an employee. Mr Tones went into his professional relationship with 3D1 with his eyes open and was prepared to be deceptive about taking legal advice. The reasons he gave in evidence for claiming he was an employee had an air of unreality about them. The agreement was not a sham.

[49] I agree with the conclusions reached by the Employment Relations Authority. This challenge had no prospect of success.

Costs

[50] These are reserved. If the parties cannot agree on them counsel for the defendant is to file a memorandum as to costs within 21 days of this judgment. The plaintiff has 14 days to respond.

C M Shaw
JUDGE

Judgment signed at 12.30pm on 19 September 2007