

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 177/07  
5073041

BETWEEN                      DAVEY GOODE  
   Applicant  
  
AND                              TURNSTONE TECHNOLOGIES LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Davey Goode in person  
   Cameron Rangeley for Respondent  
  
Investigation Meeting:     4 April 2007 at Auckland  
  
Determination:              15 June 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Davey Goode claims he was dismissed from his employment by the unilateral actions of his employer when his employment relationship was changed from that of an employee to a contractor. Mr Goode seeks six months' wages equal to a salary of \$50,000 plus a car allowance of \$7,000 per annum.

[2] No statement in reply has been received from the respondent. On 10 January 2007 counsel, on behalf of the respondent, requested an extension of time in which to file the statement in reply. An extension was granted to 16 January 2007 but no statement in reply was received. On 23 January 2007 the Respondent was advised it would need to apply for leave if it wished to appear or be heard on Mr Goode's application.

[3] On 5 March 2007 an unsigned letter was received by the Authority on Turnstone Technologies Ltd letterhead advising the company was no longer trading and all directors had resigned. A search of the Company's register on that same day showed that the company was still registered as a legal entity and the respondent was duly advised that the investigation into Mr Goode's application would continue.

[4] On 22 March 2007 Ms Barbara Smith, business manager for Turnstone Technologies NZ Ltd advised the Authority in an email, that the company was seeking legal advice about the matter and applied for the investigation meeting to be adjourned for one month.

[5] On 23 March 2007 I advised the parties that as the respondent had previously been in receipt of legal advice and had ample opportunity to seek further legal advice, the investigation meeting was to go ahead as directed.

[6] On 28 March 2007 Mr Tony Gorton contacted the Authority and advised that no-one from the company would be at the hearing, although three ex-shareholders would be available via telephone to discuss the matter. Mr Gorton also indicated that he was keen to get the matter resolved. Given this indication from the company and in light of the fact that the parties had not been to mediation at that point, I directed the parties to attend mediation prior to the date set down for the Authority's investigation meeting. A date was secured with the mediation service for that purpose.

[7] In response the company advised the Authority that the company was no longer trading, had no assets and no directors and would not attend mediation and applied for leave to respond to the matter. As at 29 March 2007 the company's register showed Turnstone Technologies Ltd as a registered company and Mr Cameron Rangeley was recorded as being the sole Director. Following further communication with the parties, it became apparent that mediation was not going to constructively contribute to the resolution of the employment relationship problem. Therefore I withdrew the direction to mediation.

[8] As it is always preferable that an application be dealt with on its merits and because I did not appreciate there would be any prejudice to Mr Goode in granting leave. the respondent was granted leave to respond to the matter provided the respondent attended the investigation meeting to answer questions from the Authority.

[9] The investigation proceeded as timetabled, on 4 April 2007.

[10] The first issue for this determination is whether Mr Goode was an employee or an independent contractor at the time he says he was dismissed. If the answer to that issue is that Mr Goode was an employee, then I need to determine whether he was dismissed. If I conclude Mr Goode was dismissed then section 103A applies:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

### The tests

[11] The nature of employment relationships is governed by section 6 of the Employment Relations Act 2000. The issue for the Authority is whether the evidence establishes the existence of a contract of or for services, when it is viewed in its totality (see *Smith v Practical Plastics Ltd*, [1998] 1 ERNZ 323).

[12] Sections 6(2) and 6(3) of the Employment Relations Act 2000 with respect to whether a person is an employee, states:

6(2) - In deciding for the purpose 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

6(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.

[13] The tests applicable to establishing the real nature of the relationship include consideration of:

- analysis of the terms and conditions which the parties have agreed to;
- the intention of the parties – although this is not decisive;
- analysis of the historical control and integration tests and the fundamental test (which examines whether a person is performing the services on their own account); and
- industry practice.

(*Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; and *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC), and *Bryson v Three Foot Six* [2005] 3 NZLR 729 (SC).

In ascertaining what the relevant matters are that the Authority must consider for the purpose of s.6(3)(a) of the Employment Relations Act 2000, I have had regard to *Bryson v. Three Foot Six Limited* [2005] 1 ERNZ 372. The Supreme Court said at para.[32] of the judgment:

..."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 requires the Court or the Authority to have regard to the features of control and integration and to whether the contracted person has been

effectively working on his or her own account (the 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 light of the control, integration and fundamental tests...

### **Terms and conditions of employment**

[14] In June 2005 Mr Goode joined his Uncle, Mr Tony Gorton as a shareholder in a company called Turnstone Technology Limited ("TTL"). The business operated by the company was a voice over IT company delivering phone services over the internet for other businesses. In August 2005 Mr Goode and Mr Gorton were joined by Ms Barbara Smith and in March 2006 Mr Cameron Rangeley also obtained an interest in the company. It was common ground that the relationship until May 2006 was that of contract of service.

[15] On 29 May 2006 Mr Gorton approached Mr Goode and discussed the idea of Mr Goode becoming an independent contractor for the company instead of being an employee. Mr Goode says he told Mr Gorton that he would talk about it when he got back from a trip to Australia which was arranged for the following week, but he did not agree to anything.

[16] Having reviewed the evidence including the correspondence provided to the Authority, I am satisfied it is more likely than not that while no firm agreements were reached on the detail of the way the relationship would work, the foundations on which the change would be based had been agreed with details to be tidied up following Mr Goode's return from leave.

[17] On or about 30 May 2006 Mr Goode travelled to Australia for his holiday as planned. He says that on 6 June 2006 he checked his emails. He had received an email from TTL attaching a copy of his final pay slip as an employee. However, this is not the date Mr Goode says he was dismissed.

[18] On Mr Goode's return from holiday, on 13 June 2006, Mr Gorton wrote to Mr Goode setting out his understanding of the terms and conditions applicable to Mr Goode's new status as a contractor. Mr Gorton writes:

1. A retainer of \$25,000 per annum will be paid to you. Payment of this retainer will be made on receipt of your invoice each fortnight. In return, Turnstone expects you to fully support the Turnstone phone system and the Cardinal IT Network. Turnstone expects you to be "On Call" with a response time of a maximum of 1 hour for completion of the job. Phone system design and network quotes are to be included as part of the retainer. These quotes are to be provided within 24 hours of our request.
2. In paying this retainer, we expect you to work exclusively for Turnstone, and you are not permitted to work for any other Phone/IT companies without the prior written consent from the Shareholders of Turnstone.

3. Installation of any phones systems required by Turnstone will be paid to you on an hourly rate of \$40.00 plus GST. This work is to be completed with the time frame given to you on assignment of the job.
4. Any IT Support Service support required by Turnstone will be paid by you on an hourly rate of \$25.00 plus GST. This work is to be completed within the time frame given to you on assignment of the job.
5. Any sales of any Phone Systems will be on a commission of 24% of the profit margin on the sale. This will be paid on receipt of the full payment of the invoice by Turnstone's customer.
6. You are not authorized to order or purchase anything on behalf of Turnstone.
7. Your vehicle is for your care. No vehicle allowance will be paid.
8. Please return your petrol card.
9. Turnstone will reimburse your phone account to a maximum of \$150.00 per month. We will deduct this from your invoice prior to payment.
10. Turnstone will provide a desk for you to work from within the premises.
11. As a Director of the Company you remain entitled to be present at any Board Meetings, or other planning meetings as they occur.
12. The changes are effective from Tuesday 6th June 2006.

[19] At the investigation meeting Mr Goode confirmed that the points outlined in Mr Gorton's letter were discussed with him. Mr Goode told me he wasn't happy about the change but wanted to sorted matters out internally. Part of the sorting out, included discussions with Mr Gorton about TTL buying Mr Goode out of his shareholding in the company. At the investigation meeting Mr Goode did not strike me as the kind of person who would simply start proffering invoices to a company and not question the final payment of his holiday pay if he truly believed the relationship had not changed

[20] There is no evidence to suggest Mr Goode disagreed with any of the contents of Mr Gorton's letter. Indeed the evidence shows that from the beginning of June 2006 Mr Goode submitted GST invoices to TTL at the rates set out in Mr Gorton's letter dated 13 June 2006. The invoices were from a company called FTT Global Ltd, a company for which Mr Goode is the sole shareholder and director.

[21] Mr Goode was paid his final invoice on 11 August 2006. It was common ground that Mr Goode had identified a work opportunity in the USA and had decided to pursue it. It was common ground that he no longer wanted to be involved in TTL and at that time he was no longer undertaking any work for TTL.

### **Intention of the parties**

[22] As already stated earlier in this determination, I am satisfied that on 29 May 2006 the intention of both parties to the employment relationship intended for the relationship to alter in status from employee to contractor. This intention was then acted on on 13 June 2006 when Mr Goode started invoicing TTL from his company for his services.

**Control, Integration and fundamental tests**

[23] After 1 June 2006, I am satisfied that the company had very little control over how or when Mr Goode undertook his responsibilities to TTL's clients. It was common ground that Mr Goode would often attend work at 10.30am and leave after 7.00pm. These times did not suit TTL particularly as their clients worked normal office hours. Also, Mr Goode was able to work from home when it suited him and he had equipment belonging to Turnstone at his home for that purpose.

[24] Mr Goode is a shareholder and director of several companies registered on the Companies Office register. It was FFT Global which provided invoices to TTL for services provided by Mr Goode, between June and August 2006. Mr Goode was in a position to profit from his work with TTL, and had the ability, with prior approval of the shareholders to work within the IT industry as he saw fit.

**Industry practice**

[25] It is not uncommon practice in the IT industry to contract the services of a skilled IT specialist. Indeed the practice was common within TTL. Mr Goode, himself, told me of at least one other person who was working as an independent contractor for TTL during the final months of his engagement, undertaking similar work as Mr Goode.

**Determination**

[26] I find that the nature of Mr Goode's employment relationship started out as an employment relationship, however, was changed by agreement from 1 June 2006. From that date Mr Goode became an independent contractor. As he was not an employee his application fails and I can be of no further assistance to him.

**Costs**

[27] I am aware both parties sought and received legal advice in the early stages of this problem. However, neither party was represented at the investigation meeting. I am therefore inclined to make no order in relation to costs, rather to allow costs to lie where they fall. As neither party has had the opportunity to make submissions on this point I will allow the parties 28 days from the date of this determination to make such submissions for my consideration. I will not consider any submissions outside this timeframe.

Vicki Campbell  
Member of Employment Relations Authority