

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 181  
5561483

BETWEEN            MALCOLM KEENE  
                                 Applicant  
  
A N D                    LINK TECHNOLOGIES  
                                 COMPANY LIMITED  
                                 Respondent

Member of Authority:     Anna Fitzgibbon  
  
Representatives:           Applicant in person  
                                 No appearance by or for Respondent  
  
Investigation Meeting:     8 June 2016 at Auckland  
  
Date of Determination:     8 June 2016

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Non-appearance of respondent**

[1]     Link Technologies Company Limited (Link) failed to file a statement in reply to the statement of problem and also failed to attend the investigation meeting today.

[2]     I am satisfied that Link was properly served with the statement of problem and subsequent correspondence from the Employment Relations Authority together with a notice of the investigation meeting.

[3]     Mr Taro Matsuno, the sole director of Link, emailed the Authority and informed it that he would not be participating because Link was no longer trading and was to be struck-off. A check of the Companies Office Register today confirms the company has not been struck-off and appears to be trading.

[4]     Being satisfied that Link was properly served with the proceedings and notice of investigation meeting, I proceeded to investigate the issue as to whether or not

Mr Malcolm Keene was an employee of Link, in the absence of Mr Matsuno or another representative from Link.

### **The investigation meeting**

[5] This matter is related to the matter brought by Mr Keene's wife, Mrs Naomi Keene, against Link<sup>1</sup>. Mr Keene and his wife both filed witness statements prior to the investigation meeting for that matter and both confirmed by way of affirmation that their evidence was true and correct.

[6] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out, along with the Authority's conclusions.

### **Employment relationship problem**

[7] Mr Keene says he was employed by Link as a proof reader for the same period of time as his wife, Mrs Keene from approximately 14 January 2013 until 25 February 2015.

[8] Link is a Japanese translation service. Mr Matsuno is the sole director and shareholder of Link, a company incorporated by him on 29 May 2012.

[9] Mr Keene says at the time Mrs Keene was employed by Link, he was requested by Link to be a proof reader of patent translations and to give expert assistance with the English language. Mr Keene says he worked approximately 234 hours and was not paid by Link for this work. Mr Keene seeks payment from Link.

[10] As mentioned, there was no representative from Link at the investigation meeting. However, in one of the emails attached to Mr Keene's personal grievance claim, there is an email from Mr Matsuno disputing that he ever employed Mr Keene and stating that Link only ever employed Mrs Keene. On that basis, Link challenged Mr Keene's ability to bring the claim to the Employment Relations Authority.

### **The issues**

[11] The issue for the Authority to determine is whether Mr Keene was employed by Link.

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<sup>1</sup> [2016] NZERA Auckland 172

## Was Mr Keene employed by Link?

[12] The statutory test for determining this jurisdictional question is set out in s.6 of the Employment Relations Act 2000 (the Act):

### *Meaning of employee*

- (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*
  - (b) *includes-*
    - (i) *a home worker; or*
    - (ii) *a person intending to work; but*
  - (c) *excludes a volunteer who-*
    - (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
    - (ii) *receives no reward for work performed as a volunteer...*
- (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 ... must determine the real nature of the relationship between them.*

[13] The background to the working relationship between Link and the Keenes is set out in paras.[14]-[16] of the determination in respect of Mrs Keene<sup>2</sup>.

[14] Mrs Keene was employed by Link pursuant to a written employment agreement as a proof reader. The details of the employment agreement are set out in paras.[19] and [20] of the determination<sup>3</sup>.

[15] In the email dated 3 December 2012 from Mr Matsuno to Mr Keene, which followed their initial meeting, Mr Matsuno stated that Mr Keene was to check and “...correct Japanese to English translation from the viewpoint of a native English speaker and to give advice on English language matters from the viewpoint of a native English speaker”.

[16] Mr Keene was not provided with a written employment agreement as was Mrs Keene and there was no discussion between Mr Keene and Mr Matsuno about terms of employment including remuneration, holiday pay, sick leave which one normally expects to occur in an employment relationship. There was no discussion about a rate of pay for any work that Mr Keene was to perform.

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<sup>2</sup> FN 1

<sup>3</sup> FN 1

[17] Mr Keene understood at the outset of the relationship that he was not an employee and from the documentation presented to me it is my view that neither did Mr Matsuno. However, Mr Keene says he expected, after a period of time, that the business would grow and he would become an employee of Link. This never occurred.

[18] Mr Matsuno made it clear in an email to the Keenes that he had no need for more than one employee at the beginning of the employment relationship and that employee was Mrs Keene.

[19] Mr Keene did proof reading for Link for approximately two years and he assessed the amount of work over that time as being 234 hours. It is clear from the evidence that has been provided to me that Mr Matsuno saw value in the work that was being provided by Mr Keene. However, when a further discussion was held in 2014 about the possibility of a written employment agreement, one did not eventuate.

[20] Both Mr and Mrs Keene worked from home and Mr Keene worked as and when required by Link but the amount of work which he was required to do was extremely limited.

### **The law**

[21] The leading judgment giving guidance on the interpretation of s.6 of the Act is that of the Supreme Court in *Bryson v. Three Foot Six Ltd*<sup>4</sup>. Section 6 requires the Authority to consider and determine the real nature of the relationship between Link and Mr Keene. The inquiry in each case is intensely factual.

[22] In this case, there was no written employment agreement which could give some guidance as to what the parties' intention was. Mr Keene's evidence is that at the outset of the relationship he did not think he was an employee. As mentioned, from the emails provided to me it is clear that Mr Matsuno did not intend Mr Keene to be an employee of Link at the outset. There is no evidence to persuade me that that intention changed during the course of the two year period that the Keenes were providing proof reading services to Link.

[23] Some of the other common law tests that the Authority considers when assessing whether or not there is an employment relationship include the fundamental

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<sup>4</sup> [2005] ERNZ 372

and control tests. Mr Keene gave evidence that he has a number of employment agreements with other organisations including AUT and in each case the employer has provided an employment agreement to him and has deducted PAYE from salary paid. Mr Keene is aware of what the requirements are for an employment relationship as he has a number of other employment relationships to which he is a party.

[24] The control test is the other test which I considered may be relevant in this particular case which deals with the flexibility or otherwise of employment. From the evidence, it was clear to me that there was a significant degree of flexibility and availability and that the work that Mr Keene was performing for Link was a very small proportion of his overall workload for other companies for whom he was employed.

### **Overall impression**

[25] Overall my impression is that the relationship between Mr Keene and Link, if indeed there was a contractual relationship, is that it was not an employment relationship, rather it could be seen as a contract for service.

[26] However, I am unsure, given the evidence that was available to me, whether or not a contract at all existed. A contract requires elements of offer, acceptance, contractual intention, consideration and certainty. In this case, there was no express agreement in relation to a number of items which would make up a contract. However, it is my overall impression that if there was a contract, it was an independent contract and not that of employment.

[27] From the evidence at the investigation meeting, Mr Keene, was eager to work as a proof reader for Link to assist Mrs Keene on the basis that there may be future good work which may lead to an employment agreement for him.

[28] Mr Keene said that some of the clients that Link had were very large with some of the Japanese patents being the largest in the world. So his expectation was that if Link was able to secure that work, he may have become employed. Unfortunately this did not occur. No employment agreement was entered into with him and unfortunately this appears to have led to him providing work for no remuneration.

[29] The Authority accordingly has no jurisdiction to deal with Mr Keene's claim that he was an employee and has employment entitlements as such.

[30] This may be a matter that Mr Keene is able to seek relief in the civil jurisdiction, perhaps in the Disputes Tribunal.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**