

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 88
3019084

BETWEEN NICHOLAS FOUHY
Applicant

AND ABTEC NEW ZEALAND 1993
LIMITED TRADING AS ABTEC
AUDIO LOUNGE
Respondent

Member of Authority: Trish MacKinnon

Representatives: Gerard Dewar, Counsel for Applicant
Graeme Ogilvie, Advocate for Respondent

Investigation Meeting: 19 June 2018 at Wellington

Submissions Received: On the day orally and in writing from the Applicant
On the day orally from the Respondent

Determination: 8 October 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Nicholas Fouhy brings to the Authority claims of unjustifiable dismissal and unjustifiable disadvantage by an action of his employer, Abtec New Zealand 1993 Limited, trading as Abtec Audio Lounge, (Abtec). He also asks the Authority to determine whether Abtec is liable to pay tax on wages he earned while working for it.

[2] Mr Fouhy seeks remedies including unpaid wages and holiday pay, and compensation for hurt, humiliation and injury to feelings.

[3] Abtec asserts Mr Fouhy was an independent contractor and the Authority has no jurisdiction in regard to the claims he made. It says Mr Fouhy was not dismissed and it is not liable to pay his tax.

[4] In the course of a telephone conference with the parties on 2 March 2018 it was decided that the preliminary issue of whether Mr Fouhy was an employee would be determined by way of an investigation meeting at which Mr Fouhy would give evidence on his own behalf and the Managing Director of Abtec, Ashley Burrell, would give evidence on behalf of the respondent.

Background

[5] In July 2015 Mr Burrell had a number of discussions with Mr Fouhy, who at that stage was in full time employment elsewhere, over the possibility of Mr Fouhy joining Abtec. Mr Burrell offered Mr Fouhy a position, the title of which was agreed as National Sales Manager. Their discussions included the potential for Mr Fouhy to eventually take over Abtec as Mr Burrell indicated he wished to step back from the business.

[6] Their discussions included Mr Fouhy being gifted one share in Abtec and receiving weekly shareholder drawings that would approximate the nett salary he was receiving with his then current employer. He would also have a company vehicle and phone provided.

[7] A start date of 10 August was agreed and Mr Fouhy resigned from his current employer, working out his notice period. Before he joined Abtec he signed a share transfer form by which he became a one-share shareholder in Abtec.

[8] During his time with Abtec Mr Fouhy received weekly payments from the company directly into his bank account. The weekly amount he received for the first four months was approximately \$50 less than the nett remuneration he had received in his previous employment. Thereafter he received approximately the same amount he had previously received.

[9] As a result of some issues at work, Mr Fouhy resigned from Abtec giving one month's notice which was due to end 30 June 2016. Mr Burrell told him to leave on 23 June and Mr Fouhy was not paid beyond that day.

[10] On 22 August 2016 Mr Fouhy received a letter from Abtec's accountant informing him that he was liable for the tax on the Shareholder Salary of \$25,150.00 he had received whilst a Shareholder Employee at Abtec in the tax year ended 31 March 2016.

[11] Mr Fouhy raised a personal grievance by letter dated 12 September 2016.

The Authority's investigation

[12] I have referred to two witnesses who attended the investigation meeting but I have not set out all the evidence brought to the Authority. Instead I have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s 174E of the Employment Relations Act 2000.

[13] The determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Legal considerations

[14] Section 6 of the Act confirms the meaning of employee and provides, at s 6(2), that:

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.

[15] In order to determine the real nature of the relationship the court or 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.¹

[16] The Supreme Court judgment in *Bryson v Three Foot Six Limited* (No. 2)² is a leading case in determining the real nature of the relationship. In that case the Court held³ that: “all relevant matters” included the written and oral terms of the contract between the parties and the way it operated in practice. It required the court or Authority to “have regard to features of control and integration and to whether the

¹ Section 6(3) of the Act.

² [2005] ERNZ 372.

³ n2 at 386.

contracted person has been effectively working on his or her own account (the fundamental test)".

The intention of the parties

[17] It was Mr Fouhy's evidence that he had only ever worked as an employee in his working life. He was excited at the possibility that he might one day own Mr Burrell's business and after three meetings with Mr Burrell, one of which included Mr Fouhy's partner and child, he agreed to accept the position of National Sales Manager.

[18] Mr Fouhy was not provided with an employment agreement. Mr Burrell acknowledged Mr Fouhy had asked about having an employment agreement. He said he had told Mr Fouhy that as a working shareholder he was not an employee but was paid by drawings. He would also have a company vehicle although not immediately.

[19] From Mr Fouhy's evidence I find he was aware he would be paid by drawings but had little concept of what that meant. He recalled Mr Burrell had told him he would be gifted one share in the company but he had no previous experience with shares and did not believe Mr Burrell had explained to him what drawings were. He recalled asking Mr Burrell about tax on drawings and being told that Mr Burrell calculated and paid all of the tax on the drawings at the end of each financial year.

[20] Mr Fouhy's previous working experience involved being an employee and paid wages. The only exception was his membership of a band which played for money from time to time and for which he paid tax as an independent contractor. Mr Fouhy was clear in his understanding of how band remuneration was treated but I find his understanding of shares and drawings was sketchy at best. This was borne out by his evidence of asking for an employment agreement after he had commenced work with Abtec as well as before agreeing to work for it.

[21] It appears no documentation was signed prior to Mr Fouhy accepting Mr Burrell's proposal to work at Abtec. Two documents were signed by them while Mr Fouhy was working out his notice period with his former employer. The first was a letter addressed to Mr Fouhy and signed by Mr Burrell dated 21 July 2015. It confirmed:

*...our offer to transfer one ordinary share in the Company to you,
which will allow the Company to remunerate you via Shareholder*

Salary. Under this method, you will receive an agreed net weekly wage and your annual Income Tax will be paid after the Company's Accountant has filed your annual income Tax return.

[22] I will return to that document later. The other document was an *Off-Market Securities Transfer Form* that records the transfer, for \$1.00 of one ordinary share in Abtec from Mr Burrell to Mr Fouhy.

[23] Mr Fouhy recalled signing a document but did not recall any contract to buy a share. He also recalled meeting other people who worked for Abtec at that time who were also shareholders. It was his understanding that all but one of the eight people who worked at Abtec were shareholders.

[24] Abtec's intention was that Mr Fouhy would not be an employee. He would be a shareholder paid by shareholder salary. Mr Fouhy's intention was not as clear due to his limited understanding of the difference between an employment relationship and the relationship Abtec wished to have with him. He realised that what he viewed as his weekly wages would be paid to him as drawings but he had little understanding of the difference between the two methods of payment.

[25] Overall, I find there was no clear mutual intention about the nature of relationship at the time Mr Fouhy agreed to work for Abtec or at the time he commenced working there. Mr Burrell was clear about the nature of the relationship Abtec wished to enter but Mr Fouhy's comprehension of the relationship and its implications for him was confused.

Control

[26] Mr Burrell's evidence is that, as a shareholder, Mr Fouhy would be paid the drawings he had agreed with Mr Fouhy regardless of whether he (Mr Fouhy) was at work or not. He could take holidays and time off for sickness whenever he wished as he was a shareholder not an employee.

[27] Mr Burrell acknowledged in oral evidence that the drawings were a salary for working. He also acknowledged Mr Fouhy had no signing authorisation over the company bank accounts and could not take drawings from those accounts: he could only receive them when allocated to him by Abtec.

[28] Mr Burrell said that at the end of the year the company's accountant allocated a shareholder salary and decided who would receive drawings to pay their tax obligations. He said he was unsure how that worked. He was also unsure about payment for holidays but believed shareholders were paid holiday pay under the Holidays Act.

[29] Mr Fouhy's evidence is that he had no control over the remuneration he received or the hours he had to work. He was required to work 6 days a week at specified hours and on occasion on Sunday as well. This was a feature of his time at Abtec from the outset. Additionally, Mr Burrell phoned him at home almost every evening after hours. On one occasion when Mr Fouhy was ill for two days, his evidence is that Mr Burrell required him to work from home and instructed him in the work he was to undertake.

[30] Mr Fouhy says that, while Mr Burrell had told him before he accepted the National Sales Manager's role that he would have freedom over the hours he worked, in practice that did not ever happen. Mr Burrell dictated the hours he worked and he had no input into any decisions about that.

[31] Mr Fouhy's evidence is that Mr Burrell told him once that if he was not prepared to do the hours then he may as well look for another job. Mr Burrell denies having said that but, having assessed the evidence of both men, I find it more likely than not that Mr Burrell did convey that to him.

[32] From the evidence provided to the Authority I find Mr Fouhy had very little control over his hours of work, or how he performed his duties. He worked hours specified by Mr Burrell and those hours were changed during the course of Mr Fouhy's time at Abtec by Mr Burrell without consultation with Mr Fouhy.

[33] The one concession Mr Fouhy received was a change to his Saturday hours to start one hour later after he raised that issue. It was not a matter he had the ability to control himself and he had to seek permission for the change.

[34] This test alone is inconclusive in determining the real nature of the relationship although it points more to an employment relationship than to one of independent contracting.

Integration

[35] Mr Fouhy's work as National Sales Manager was an integral part of Abtec. There was no evidence put forward to suggest the role was anything but part and parcel of the operation of the business. It was properly conceded in submissions for Abtec that the role was fully integrated into the business.

[36] On its own this test is not determinative but indicates more to a relationship of employment than to one of independent contracting.

Fundamental test

[37] The question at issue here is whether Mr Fouhy was in business on his own account. The evidence put forward by Abtec relates to Mr Fouhy's method of remuneration as proof of his non-employment status. It has not put forward evidence of how he was in business on his own account other than referring to his shareholding and the fact that he was an independent contractor in relation to his earnings from the band he played in.

[38] Mr Fouhy's shareholding, which I have referred to earlier, consisted of one share out of the company's 100 allocated shares. Burrell Marketing Group NZ Limited (Burrell Marketing), which is the ultimate holding company of Abtec, holds 89 shares. Mr Burrell as the sole director of Abtec holds five shares. He is also the sole director of Burrell Marketing and holds further shares through that company.

[39] The same letter that offered Mr Fouhy one ordinary share in Abtec also required him to sign a consent to the transfer of his share *to allow for the future resignation of yourself as Shareholder ...which will be activated only in the event that the relationship with you is discontinued for any reason.*

[40] I do not find Mr Fouhy's allocation of one share in Abtec provides sufficient evidence of his being in business on his own account, particularly as his right to continued ownership of that one share was contingent on his continued relationship with Abtec.

[41] The application of this test indicates more towards an employment relationship than independent contracting.

[42] **Conclusion**

[43] I have found there was no clear mutual intention about the nature of the relationship Mr Fouhy would have with Abtec prior to his joining the company. He had little or no control over his hours of work, the work he performed, or the remuneration he received for that work.

[44] His one share shareholding in Abtec was too insignificant to allow him any voice in the direction of the company and his role was fully integrated into the business of Abtec.

[45] In most respects the tests I have applied indicate an employment relationship. I therefore conclude the real nature of the relationship was one of employment.

[46] The Authority will contact the parties shortly to arrange the progressing of Mr Fouhy's claim to have been unjustifiably dismissed.

Costs

[47] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority