

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 205/08  
5101579

BETWEEN                      CLIFFORD BAILEY  
   Applicant  
  
AND                                THE KNOWLEDGE GYM (NZ)  
   LTD  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Clifford Bailey in Person  
   Max McGowan for Respondent  
  
Investigation Meeting:      28 May 2008  
  
Determination:              10 June 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

- [1]      Mr Clifford Bailey claims he was constructively dismissed from his employment at The Knowledge Gym NZ Ltd when he was bullied to such an extent that further employment was untenable.
- [2]      He is seeking reimbursement of lost wages and compensation for hurt and humiliation.
- [3]      The Knowledge Gym (NZ) Ltd denies the claims and says Mr Bailey was never employed or engaged by The Knowledge Gym (NZ) Ltd, but was engaged as a contractor by EK Management Ltd.
- [4]      The first issue to be determined is the identity of the employer. If I find The Knowledge Gym (NZ) Ltd was Mr Bailey's employer I will proceed to determine whether Mr Bailey was an employee or a contractor.
- [5]      In the event I find Mr Bailey was employed by Knowledge Gym (NZ) Ltd as an employee, then I will proceed to determine whether Mr Bailey was unjustifiably constructively dismissed pursuant to the tests set out at section 103A of the Employment Relations Act 2000 which requires the Authority to

scrutinise the respondent's actions and ascertain whether its actions and how it acted were what a fair and reasonable employer would have done.

[6] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

### **Identification of correct employer**

[7] Mr Mike Doughty says Mr Bailey was never engaged or employed by The Knowledge Gym NZ Ltd. Mr Doughty says Mr Bailey was engaged on a contract for service by EK Management Ltd.

[8] A written agreement signed by Mr Bailey on 17 May 2007 states that the parties to the agreement are Mr Bailey and EK Management Limited.

[9] The Knowledge Gym (NZ) Ltd and EK Management Ltd are separately registered legal entities. Both companies are owned by LP Investments Ltd. Mr Doughty does not have any interest in LP Investments Ltd. Mr Doughty and his partner, Ms Jodi Bloomfield, are directors of The Knowledge Gym (NZ) Ltd, while Mr Doughty alone is the Director of EK Management Ltd.

[10] EK Management Ltd entered into a licence agreement in May 2003 with Executive Knowledge (NZ) Ltd. In September 2006 Executive Knowledge (NZ) Ltd changed its name to The Knowledge Gym (NZ) Ltd.

[11] The payroll records produced show that EK Management Ltd was liable for the payment of all wages and income tax for Mr Bailey.

[12] Mr Bailey relies on the business cards used by him during his engagement, which has The Knowledge Gym (NZ) Ltd in large print on the card. Mr Bailey says this is evidence that his employer was actually The Knowledge Gym (NZ) Ltd. However, the business cards also refer to the Licensee as being EK Management Limited.

[13] I am satisfied The Knowledge Gym (NZ) Ltd was a trademark brand used under licence by EK Management Ltd.

[14] In all the circumstances of this case and on the balance of probabilities I find the employer was EK Management Ltd and not The Knowledge Gym (NZ) Ltd. I am unable to assist Mr Bailey any further in this application.

**Costs**

[15] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell  
Member of Employment Relations Authority