

## IN THE EMPLOYMENT RELATIONS AUTHORITY

[2018] NZERA Auckland 9  
3011494

BETWEEN            EVGENY (JOHN) BATUSOV  
                                 Applicant

AND                    TRADEFLOOR LIMITED  
                                 First Respondent

AND                    MARTIN DREW  
                                 Second Respondent

AND                    YULIYA BATUSOV  
                                 Third Respondent

Member of Authority:    TG Tetitaha

Representatives:        Applicant in person  
                                 V McGoldrick, for Respondent

Investigation Meeting:    12 to 13 and 30 October to 1 November 2017

Submissions received:    1 November 2017 from both parties

Determination:            11 January 2018

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### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

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- A. John Batusov was employed by Tradefloor Limited from October 2016.**
- B. John Batusov was not unjustifiably dismissed by Tradefloor Limited.  
The employment terminated by agreement on 23 January 2017.**
- C. I order Tradefloor Limited to pay John Batusov wage arrears of  
\$2,923.29.**
- D. Costs are reserved.**

#### Employment Relationship Problem

[1] Tradefloor Limited is a wholesale flooring retail business based in Whangarei. John Batusov was a former director of the company. He alleges he was employed then unjustifiably dismissed.

[2] TFL denies he was employed at all. Even if he was employed he has not raised his personal grievance within 90 days of his dismissal and has not sought leave to raise it out of time. Therefore there is no jurisdiction to bring the claim before the Authority.

### **Relevant Facts**

[3] John Batusov (John) is the son of the third respondent, Yuliya Batusova (Yuliya). Both immigrated to New Zealand from Russia. Yuliya met then married the second respondent Martin Drew (Martin) in the early 2000's. Martin also immigrated to New Zealand from the United Kingdom.

[4] It is accepted that during their relationship Yuliya and Martin combined personal assets to purchase a family home and various investment properties and businesses in Auckland and Whangarei. They used a trust vehicle to purchase these known as NH Trustees No 7 Trust (Trust). Yuliya and Martin were named as beneficiaries and settlors. John was not.

[5] By way of background, John maintains he has a claim to the Trust assets due to Yuliya's use of his money from the sale of a property in Russia for the purchase of a property in Anzac Avenue Auckland in 2006. This property was allegedly sold and the proceeds used to purchase Trust assets. The fact of this claim has some peripheral relevance to the parties intentions in the matter before the Authority. However, I cannot determine the claim because it does not arise from the alleged employment relationship. This is a matter for another Court or Tribunal to determine.

[6] John and Martin were in paid employment until 2014/15. In October 2014 John was dismissed from his employment. He accepts he sought advice and was told about the need to raise a personal grievance within 90 days. In February 2015 Martin was made redundant. Yuliya remained in paid employment throughout.

[7] In 2006 the Trust purchased a property at Glen Road in Auckland. Following his redundancy, Martin and Yuliya decided to renovate this property for sale at a profit. For a period of nine months from January 2015 until May 2016 John and Martin undertook the majority of the renovation work. Yuliya assisted when she was not at work elsewhere.

[8] There is a claim by John to recover payment for his work on this property. It is accepted he undertook this work as an independent contractor. This claim has peripheral relevance to John's availability to work and his claim of employment before the Authority. However I cannot determine his independent contracting claims for renovation work because it does not arise from the alleged employment relationship. That is also a matter for another Court or Tribunal to determine.

### **Trade Flooring Limited**

[9] It was during these renovations Yuliya discovered a cheap supplier of bamboo flooring. John, Martin and Yuliya decided to create a business importing and selling wholesale bamboo flooring to flooring installers. The parties agreed to incorporate a company to run their joint business venture.

[10] On 28 April 2015 Tradefloor Limited (TFL) was incorporated. John, Martin and Yuliya were appointed as directors. Martin and Yuliya were the only shareholders.

[11] On 7 June 2015 John ceased being a TFL director.

[12] In September/October 2015 John and Martin attended a "Homeshow" event in Whangarei showcasing TFLs flooring products. As a result TFL began receiving work from the Whangarei area.

### **Drawings**

[13] In November 2015 a decision was made to allow the TFL directors Martin and Yuliya to take drawings. This is evidenced by a Cash Summary for month ended 31 January 2016 produced by Yuliya showing drawings from November 2015. It was not contested that the drawings were applied to the Trust mortgages and other outgoings.

### **Independent Contracting**

[14] From December 2015 to April 2016 Yuliya made payments of \$150 to John from her personal bank account. Martin also made payments to John of small amounts of cash and cigarettes from his personal funds.

[15] By 24 January 2016 John was seeking payment from TFL for his work. He emailed Martin a PAYE calculation form. He resent the same details in April 2016.

[16] A decision was made sometime in 2016 by TFL to begin installing its own flooring products. Both Martin and John undertook the work. It is accepted John was paid as an independent contractor for flooring installations throughout 2016 to January 2017. Martin was not paid at all. At times John invoiced TFL for his work as a person not registered for GST

[17] From John's bank account records, the first payment he received for installation work was on 22 September 2016. The last payment was made on 23 January 2017.

### **Separation and further payments**

[18] In October 2016 Martin and Yuliya separated. John and Yuliya remained living in Auckland. Martin moved to Whangarei. During this period they agreed to pay John \$2,000 per month for administration work. The tasks he was to perform were not defined. There is a dispute whether this payment was wages or for work as an independent contractor.

[19] On 10 October 2016 Martin authorised the payment of \$2,000 to John. The payment was recorded in the bank accounts as "Drew MP Tradefloor contractor". On 18 October 2016 John recorded the payment in TFLs Xero accounting system as a sub-contractor payment with no GST.

[20] On 3 November 2016 Martin authorised a further payment of \$2,000 to John. The payment was recorded in the bank accounts as "Drew MP Tradefloor contractor". However John later recorded the payment in TFLs Xero accounting system as being "Wages October 2016".

[21] On 3 December 2016 John recorded a payment of \$1,716.71 in TFLs Xero accounting system as being "Wages". On 9 December 2016 Martin authorised the payment of \$1,716.71. The payment was recorded in the bank accounts as wages.

[22] A document was produced at hearing headed "takehome pay" with a total of \$1,716.71. It referred to an hourly rate of \$15.25, set out his working days (22 days),

deducted days he was working on installations (3 days), produced a gross figure of \$2,028.25, tax rate of 15.36% and tax to be deducted of \$311.54.

[23] There is no record of PAYE being deducted or paid on behalf of John to IRD.

### **Termination of employment**

[24] When John returned from leave on 6 January 2017 he found his access to TFLs Xero accounting system had been removed. He text messaged Martin on 6 January 2017 stating:

Just heard from [PK]. You instructed him to remove my access.

A notice would be nice. You effectively stopped me from working and I cannot perform duties we previously agreed on. As I have no access to Xero, I cannot continue working as I did.

You instructed [PK] to remove my access to the system, therefore it was completely deliberate. There is no room for mistake.

Barring me from duties effectively ends my employment.

[25] Martin replied the same day stating:

Why do you need access to the accounts when I can do the accounts myself. Don't worry, Im still happy to pay you for the valuable things you do mate. Just complete the time sheets as you suggested.... No problem and less stress on you. It's all good.

[26] John texted his reply below:

I cant perform Admin duties this way. I cant do sales, quotes or even send out samples. It came as a shock to me. But its ok. I will finalise things soon.

[27] Martin then replied:

By the way you still have access.

Not legally ... no employment contract. I'm happy to do this properly as your Mum wanted. I don't know why everyone has got the wrong idea. I thought it would be better.

[28] John replied again below:

You reduced the number of things I can do, which reduced my hours. Therefore I cannot continue. You can also do the quotes and deliveries as you have in the past. I simply cannot be available 24/7 for 3 hours at minimum wage per week. All I need from Tradefloor is my final pay for December and 2 installations.

[29] Martin replied again:

Jesus. I don't understand why everyone has the wrong idea. Let's go back to the way it was then if you're happy with that.

[30] John then replied:

The idea is absolutely right. The facts speak for themselves. You reduce my workload therefore working hours without prior notice nor consultation. You instructed the accountant to remove my access to the system. These conditions are unacceptable to me.

[31] Martin then finally replied:

Well you can have them back if it's caused that much of a problem. I was happy to do the administration less installation as we discussed.

[32] It is accepted John's access to TFL's Xero accounting system was restored in January 2017. John continued invoicing TFL for installation work on 20 January 2017.

[33] On 23 January 2017 text messaging was exchanged between John and Martin about John's employment. John texted:

Regarding Tradefloor, I have no alternative but work for a set wage/salary. Installations is good money but not regular enough. Sure I make a grand in 3 days of work while doing installations but I cant rely upon it, payments are irregular, I have to keep asking many times a day many days and weeks in a row and there arent enough jobs. One month there is one job, another month there are 3. Other months there are none.

[34] Martin replied that he advised the others to copy John into the TFL communications. John then replied:

No need to cc. I don't work for Tradefloor. You said yourself you do the admin and everything else. I trusted you for 2 years with tradefloor wages. No result.

[35] Martin then replied again:

The cc is so that you get an understanding of TFs position and why it cant meet your demands at this time. Don't keep going on about salaries and trust John. Its getting boring. When will you admit that the funds were being sucked out for mortgages. None of this is my fault, we were mugs. I wanted a salary too.

[36] PK emailed Martin and Yuliya on 24 January 2017. It appears there had been discussions with the accountant about the terms and conditions of John's employment.

His email stated:

Further to my emails below and subsequent phone discussion with Martin we strongly recommend that no changes be made to the operation of Tradefloor until we have completed the financial review of both businesses and all rental properties. This is going to take at least a couple of months if we get your full cooperation based on the difficulties we have encountered to date.

We believe that the only way that John can be remunerated from Tradefloor in the interim is as a self employed installer. Tradefloor will have to deduct 20% withholding tax.

Once the full review has been completed and discussed you can then make a decision on whether or not John is to be a director of Tradefloor and whether or not the company can realistically pay John a salary which will be acceptable to him.

[37] That same day at around 11am, Martin and John were texting about his employment. John stated at 11.12am:

Currently I am working on calculating what marketing, sales, admin, delivery, stock controllers and others are paid.

[38] Martin then replied:

But that makes two of us? I would be happy to employ you as a delivery and stock controller as I am doing sales, admin and marketing. I can start you today. I'll get in touch with PK. By the way, if you're not working for Tradefloor yet, why are you using company funds. We need to move all underlay to super freight for easier stock control. Your next job I'll email to you now... Stock control. Welcome back.

[39] John then replied:

A director. Until then stop wasting our time.

[40] At hearing John confirmed he believed TFL ought to be split into two entities, one operating in Auckland and Waikato, under Yuliya and his control, and the other operating in Northland under Martin's control.

[41] During this period Yuliya refused Martin access to the company vehicle, tools and stock. She also froze TFL's bank accounts.

[42] The following day on 25 January 2017 Yuliya emailed TFLs accountant seeking the drafting of an IEA for John offering him a role as a personal assistant at \$36,000 pa. No IEA was drafted or signed.

[43] On 20 February 2017 John incorporated a company Tradefloor NZ Limited (TNZ). He was the sole director and shareholder.

[44] The previous day Martin had emailed John complaining TFL's website had been changed without his knowledge and consent. It was alleged John had accessed the website and diverted the 0800 number to his personal mobile number.

[45] By 7 March 2017 Martin filed without notice proceedings seeking orders for control of TFL's business and assets.

[46] On 25 May 2017 John filed a Statement of Problem with the Authority raising personal grievances and seeking payment of wages. This was served upon TFL on 26 May 2017.

[47] The parties have been unable to resolve their differences and now seek a determination.

### **Issues**

[48] The issues for hearing were discussed at the telephone conference held on 2 August 2017. These have now expanded at hearing. The issues for determination are now:

- (a) Was John employed by TFL?
- (b) If so was he constructively and unjustifiably dismissed :
  - i. On 4 January 2017 by the removal of his access to TFLs Xero Accounting system?
  - ii. In February 2017 by the reversal of the changes he had made to TFLs website rerouting enquiries to his mobile phone?
  - iii. In February 2017 by the removal of John's quotes from TFLs Xero Accounting system?
- (c) Was a personal grievance for unjustified dismissal raised within 90 days?
- (d) If no, should leave be granted to extend the time for filing the personal grievance? Are there exceptional circumstances warranting leave?
- (e) What remedies (if any) should be awarded including wages arrears?

### **Was Mr Batusov employed by TFL?**

#### ***Was John employed by TFL?***

[49] John alleges he was an employee of TFL from April 2015. An employee is defined in s6(1)(e) of the Employment Relations Act 2000 (Act) as "*any person of any age employed by an employer to do any work for hire or reward under a contract*

*of service*". Whether someone is employed by another requires the determination of "the real nature of the relationship between them"<sup>1</sup>. The Authority "must consider all relevant matters, including any matters that indicate the intention of the persons" but "not to treat as a determining matter any statement by the persons that describes the nature of their relationship."<sup>2</sup>

[50] In considering "all relevant matters" under s 6 of the Act, the Authority shall apply "tests" such as control, integration and the "fundamental test"<sup>3</sup>.

[51] The control test considers the degree of control and supervision exercised by the employer over the alleged employee's daily work.<sup>4</sup>

[52] The integration test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become *part and parcel of the organisation*.<sup>5</sup> However in a situation with only a single employee/contractor, the integration test is not suitable as a measure to be applied.<sup>6</sup>

[53] The fundamental test asks the question whether the alleged employee engaged themselves to perform the services with the employer as a person in business on their own account.<sup>7</sup>

### ***Was John employed from April 2015?***

[54] It is accepted John, Yuliya and Martin all hoped to make TFL commercially viable to provide fulltime employment for all of them. There were discussions about possible wages of \$2,000 per week. It is accepted at the time of TFL's incorporation, there was insufficient income to fund any full time employee let alone all three.

[55] Both Martin and Yuliya agree there were no agreement to "backpay" John wages.

[56] John stated at hearing he was told in April 2015 "show your commitment and you will get a wage or salary out of it" as evidence of an offer of employment. This is

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<sup>1</sup> Section 6(2) ERA

<sup>2</sup> Section 6(3) ERA

<sup>3</sup> *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114 EmpC at [46].

<sup>4</sup> *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [38].

<sup>5</sup> *Bank voor Handel n Scheep AART N v Slatford (No.2)* [1953] 1 QB 248 at 295.

<sup>6</sup> *Clark v Northland Hunt Inc* (2006) 4 NZELR 23.

<sup>7</sup> *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [52].

insufficient on its own to show an agreement to his employment from April 2015 or evidence agreement to backpay him. Yuliya produced a budget for TFL for February 2016 to January 2017. This showed no wages were budgeted to be paid until August 2016. The wages forecast also did not encompass “backpay” from \$2,500 in August 2016) rising to \$28,370 in January 2017. This evidences no intention to pay John for his work until possibly August 2016.

[57] I accept John did limited work for TFL from April 2015 but it was not “24/7” as he alleged. Most of the work for TFL in the beginning was a few hours per week. This largely involved John and Martin “cold calling” flooring installers and builders show homes and setting up a website through a third party. John produced at hearing his personal email inbox that had TFLs emails from April 2015 redirected to it. This showed there were few if any client enquiries until September 2015. One client was serviced in July 2015. It is not until after the 2 day attendance at the October 2015 Whangarei Homeshow that sales appear to pick up in Whangarei and Auckland. There appears to be more enquiries but the answering and quoting of jobs was split between both John and Martin.

[58] During this period he also did renovation work on Trust assets at Glen Road until it was sold. John had produced an invoice of his work on Glen Road including the period April 2015 to May 2016. The total hours were 308.5 hours. Overall the evidence showed the work for TFL may have only amounted to 3-6 hours per week. It was certainly not fulltime.

[59] There were other indications John would have been content at the time to accept no payment for his work at that time. He resided in a Trust property rent free in Auckland. He had low or no living costs. All of his other expenses were being met by the Trust and up until February 2016 John received payments from Martin and Yuliya of \$150 per week and cigarettes.

[60] It was not until January 2016 that John started raising issues about payment. This appears to coincide with the drawings that were being taken by Yuliya and Martin that ranged from \$1,250 to \$12,686.09 per month. John’s evidence was he became desperate and sought to negotiate payment of a monthly gross wage of \$781.63 per week as shown an email attaching his employee details that he sent to Martin. This was not accepted by TFL because no payments were made.

[61] Instead John became an independent contractor not registered for GST installing flooring for TFL clients. This was obviously intended to address his issues about payment. He did receive and was paid for installation work between 22 September 2016 and January 2017.

[62] In my view John was not employed from April 2015.

***Was John employed later?***

[63] However matters changed in October 2016 following Martin and Yuliya's separation. All parties accepted there was an agreement to pay John \$2,000 per month from October 2016. They disagree about whether it was employee wages or a variation to his independent contractor arrangement to include administrative duties.

[64] Martin has sworn an affidavit in another jurisdiction stating:

John was paid a fixed wage of \$2,000 per month. He carried out deliveries and provided samples. John was paid an additional payment of \$25 per square meter for installations. Apart from these duties, John's other role was to work on the website and the administrator for Xero.

[65] Martin now says this affidavit was incorrect insofar as confirming John was an employee of TFL.

[66] Three payments, two of \$2,000 and one of \$1,716.71 were made in October, November and December 2016 from TFLs accounts. The two \$2,000 payments in October and November were both characterised as an independent contracting payments by Martin in the bank accounts. The October 2016 payment was recorded by John in Xero as an independent contracting payment. The November 2016 payment was recorded by John as wages. Both Martin and John recorded the December payment of \$1,716.71 as wages.

[67] Although no PAYE was paid by TFL on John's behalf, this is not determinative of John's status.

[68] Applying the legal tests I have determined John was an employee of TFL from October 2016.

[69] In the course of turning their minds to employment, both TFL directors then sought to control John's work by Martin prescribing his duties through emails and Yuliya seeking a proposed employment agreement and job description throughout

January 2017. Prior to employment, John worked unsupervised with little restraint exercised by the TFL. Although Yuliya referred to daily meetings around the dinner table, these did appear to exercise any control over John's activities because she also admitted she did not know exactly what he or Martin were doing.

[70] John was integral to TFL's future flooring sales and installations. He provided installation services at lower rates which allowed TFL to receive higher profits. There was work that Martin was unable to handle on his own. The separation of Martin and Yuliya brought to the fore TFL's need to reach an agreement with John or risk him immediately withdrawing his services. There were several installations occurring in and around this period.

[71] The evidence of whether he was in business on his own account is not definitive here. There was only one "invoice" for three payments made. The "invoice" does not contain the usual independent contractor details. It has no GST or tax number or the contractor's address and details for payment. I accept John's it was intended to set out the calculation of his wage not invoice for services. It does not show he was undertaking independent contracting work for the \$1,716.71 payment or for the two \$2,000 payments made previously.

[72] The three payments were made through TFL's accounts not Yuliya and Martin's personal accounts.

[73] The evidence supports John was employed by TFL from October 2016.

[74] In the circumstances the actions against the two directors alleging they were the employers personally are dismissed.

### **Was John unjustifiably dismissed by TFL?**

#### ***Was John dismissed or did the employment terminate by agreement?***

[75] For unjustified dismissal claims, the employee must first establish that there has been a dismissal. The onus then shifts to the employer under s 103A(2) to prove that the employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[76] A dismissal can occur where termination of employment is at the initiative of the employer.<sup>8</sup>

[77] There are three pieces of conduct that John alleges equate to a dismissal. These are the removal of Xero access on 5 January 2017 and the reversal of the changes he made to the website and removal of quotes he had done in February 2017.

[78] The removal of his Xero access was explained then reversed within days. I do not consider this to be an act of dismissal. Martin explained it was undertaken on the accountant's advice. There was no evidence this was intended to be a dismissal.

[79] However it is John who indicates the employment relationship has ended by 23 January 2017 when he emails Martin stating he does not work for TFL.

[80] The later acts in February 2017 do not indicate an act by TFL to dismiss John. Rather it is John's actions that initiated Martin acting to seek a reversal. Similarly the quotes were also placed in the system by John. Martin removes the quotes in the belief they are false. No evidence was produced showing the validity of the quotes. None of these actions by Martin on behalf of TFL would constitute dismissal.

[81] There was evidence that John did not consider himself an employee of TFL from 23 January 2017. Both John and Yuliya wanted to separate TFL's established clientele between into two different entities. Martin did not. It is more likely than not John incorporated TNZ for the purposes of taking and servicing TFLs Auckland clientele for his own benefit. The changes to the website support this inference. Although he states this was done under the direction of Yuliya, he was well aware Martin did not agree to these changes yet did them anyway.

[82] There is evidence the accountant advised against employment in January 2017 but John was already employed by then. The text messaging by John and Yuliya throughout January 2017 appears to be an attempt to salvage their employment relationship by defining terms and conditions.

[83] Overall it appeared John was working for his own interests from February 2017. This employment appears to have terminated on or about 23 January 2017 at instigation.

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<sup>8</sup> *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at p103.

[84] John Batusov was not unjustifiably dismissed by TFL. Given that finding there is no need to consider the issue of the time limitation of 90 days to raise a personal grievance.

### **Wage arrears**

[85] There is a matter of wage arrears. This is well within time.

[86] He seeks payment of a salary of \$75,000 (reduced to \$45,000 at hearing). There was no evidence of any agreement to pay a salary of \$45,000 or higher from April 2015 or at any later date.

[87] There was clear agreement John was to be paid \$2,000 per month in the hand. He is owed the balance of \$283.29 for December 2016, \$2,000 for January 2017 and holiday pay of 8% upon the gross pay of \$8,000 (\$640). He is owed \$2,923.29 wage arrears.

### **Orders**

[88] John Batusov was employed by Tradefloor Limited from October 2016.

[89] John Batusov was not unjustifiably dismissed by Tradefloor Limited. The employment terminated by agreement on 23 January 2017.

[90] I order Tradefloor Limited to pay John Batusov wage arrears of \$2,923.29.

[91] Costs are reserved. Any party seeking costs must file a Memorandum within 14 days of this determination. The other party has 14 days thereafter to reply.

**TG Tetitaha**  
**Member of the Employment Relations Authority**