

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 103/10  
5274977

BETWEEN                      JOHN KEVIN BROAD  
Applicant

AND                              FINANCIAL GAIN  
(AUCKLAND) LTD  
Respondent

Member of Authority:        James Wilson

Representatives:             John Broad in person  
Terry Rota for the respondent

Investigation Meeting:      29 October 2009 at Auckland

Submissions received:      22 September 2009 from the applicant  
9 October 2009 from the respondent

Determination:                5 March 2010

---

**DETERMINATION OF THE AUTHORITY**

---

**Issues**

[1]     The single issue for determination in this matter is whether or not Mr John Broad, the applicant, was an employee of Financial Gain (Auckland) Ltd or, in the alternative, his relationship with Financial Gain was that of an independent contractor.

[2]     Mr Broad, in his statement of problem filed with the Authority in July 2009, seeks payment from Financial Gain of \$10,597.24 he says is owing to him for work undertaken for that company, payment in lieu of one month's notice (\$7500) and the costs associated with filing his claim in the Authority.

[3] Mr Broad originally sought payment for the monies he says he is owed by filing his claim in the Disputes Tribunal. However the Tribunal dismissed Mr Broad's claim for want of jurisdiction but commented that Mr Broad could re-present his claim to the Tribunal *if and when it is properly determined that the claim falls within the jurisdiction of the Tribunal*. In its decision the Tribunal said:

*... in hearing from the parties it is far from clear that this was not in fact a contract of employment in terms of section 6 of the Employment Relations Act 2000. If so, only the Employment Court or the Employment Relations Authority would have jurisdiction to deal with the dispute.*

...

*The Tribunal cannot determine whether the contract is one of employment or not. Only the Employment Court or the Employment Relations Authority can do that.....*

[4] Mr Terry Rota, the Managing Director of Financial Gain, says that his company did not employ Mr Broad and, whatever Mr Broad's status, does not owe him the monies he is seeking to recover.

[5] If I find that Mr Broad was not an employee, he is entitled to re-file his claim with the Disputes Tribunal. If I find that he was an employee I will then seek further input from the parties before determining whether or not he is entitled to the payments he is seeking.

### **Legal considerations**

[6] The Employment Relations Act (the Act) at section 6(2) says that:

*(2) In deciding ... 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.*

*(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 the relationship.*

[7] Judge Shaw in the Employment Court in *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581, said:

*[19] Since s 6 of the Employment Relations Act 2000 changed the tests for determining what constitutes a contract of service there have been two cases which have interpreted the changes to the law. The principles established by those cases can be summarised as follows.*

- *The Court must determine the real nature of the relationship.*
- *The intention of the parties is still relevant but no longer decisive*
- *Statements by the parties, including contractual statements, are not decisive of the nature of that relationship.*
- *The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration, and the "fundamental" test.*
- *The fundamental test examines whether a person performing the services is doing so on their own account.*
- *Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

And in a subsequent judgment in the same case (*Bryson v Three Fort Six Ltd.(No 2)* [2005] 1 ERNZ 372 at paragraph [32]) the Supreme Court, upholding the earlier decision of the Employment Court, said:

*It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing the contract. How the relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or the Authority to have regard to 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 would usually be possible to examine the relationship in the light of the control, integration and fundamental tests....*

### **The factual background**

[8] Regrettably there is no written contract between the parties setting out what their intentions may have been at the commencement of the relationship. There seems however to be little doubt that when Mr Broad originally formed a relationship with Financial Gain he understood that the relationship was by way of a contract between his company (Financial Concepts Ltd) and Financial Gain Limited. Even after this relationship ended Mr Broad continued to assume that this was a contract for services. This is demonstrated by his applying, in the first instance to the Disputes Tribunal in an attempt to recover the disputed funds. That application was supported by a tax invoice in the name of Financial Concepts Ltd. This intention is not of course determinative of the issue. When advised, by the Disputes Tribunal, that he may have been in an employment relationship, Mr Broad reviewed his position and filed his application with the Authority. In support of his application Mr Broad said, in his statement of evidence:

- *The intention was to form a contract. Unfortunately a contract was never provided, although several requests were made before and after commencing the position.*
- *I was required to be present during office hours and worked in the office regularly from 9:30 AM until 6:30 PM. Although I did meet clients, accountants, etc. during the day and occasionally in the evenings.*
- *Terry Rota had the power to hire and fire and/or alter the arrangement without notice, as was the case. Profits and losses from the enterprise were not shared, they were attributed to Terry Rota. Client ownership was held by the business, which is unusual for financial services businesses.*
- *I was responsible for ACC levies and personal income tax.*
- *Materials were supplied by the business. I.e. stationery, business cards etc.*
- *Phone, facsimile, and photo copier were provided as well as a desktop computer, however I supplied my own laptop.*
- *I was bound to the business and was not allowed to work elsewhere.*
- *Payment was paid monthly, at \$7500 including GST,....*
- *The business paid for my professional indemnity and public liability insurance*

In his statement Mr Broad goes on to describe his role with the business under three headings; General Manager, Sales Manager and Investment Advisor, Insurance Advisor and Wealth Coach.

[9] In his witness statement in reply to Mr Broad, Mr Rota says that Mr Broad was contracted to various companies all of which had relationships with each other and that Mr Broad's company entered into a verbal contract with each of these to carry out various tasks. Mr Rota says that the verbal arrangement he entered into with Mr Broad required Mr Broad to complete various tasks for the various companies and that he and his team would make specific sales targets in order to maintain the "commission advance". The commission advance was to be paid in arrears for the month worked, the understanding being that this advance would be paid until the role was creating more than the advance in real commissions and any advances would be recovered from future sales commissions. Mr Rota also points out that Mr Broad submitted a monthly invoice.

[10] In response to Mr Broad's specific points (as listed in paragraph [8] above) Mr Rota says:

- It was part of Mr Broad's role to complete such things as contracts, disclosure statements etc.
- Mr Broad had no set hours.
- He (Mr Rota) made recommendations to the various Directors of the various businesses to use Mr Broad's services.
- There were no profits to share and after six months Mr Broad and his sales team had managed to bring in a total revenue of less than one month's commission advance.
- As a contractor Mr Broad would be responsible for his own ACC levies and personal income tax and he was also responsible for his own GST.
- In an attempt to create a single "brand" for the various businesses he (Mr Rota) decided to fund stationery, business cards etc.
- Phone, fax and photocopier were provided as Mr Broad indicated that he could not afford such things without assistance.
- Mr Broad worked for five different companies related to Financial Gain Limited.
- Mr Broad was paid commission advance at \$6666.67 plus GST.

- The various businesses with whom Mr Broad had contracts had professional indemnity and public liability insurance which covered any of the entities that contracted to them, including Financial Concepts Ltd. (Mr Broad's company).

Mr Rota also says that the general manager and sales manager roles which Mr Broad describes were previously completed by a management consultant working in the business for approximately 6 to 8 hours per week. The role of investment advisor, insurance advisor and wealth coach were the main reasons for contracting Mr Broad to the various businesses.

## **Discussion**

### *The intention of the parties*

[11] There is no dispute on this point. The parties agree that it was their intention to enter into a contract for services. Mr Broad accepts that at its commencement he intended to form a contract i.e. to become a contractor within a group of companies providing financial services. At the end of the relationship he pursued his claims in the Disputes Tribunal on the understanding that he was in a contract for services and not an employee.

### *The control test*

[12] In this regard I prefer of Mr Rota's evidence. While it may have been convenient for all concerned for Mr. Broad to spend specific hours in the companies' offices there was no compulsion for him to be there at those times. He was free to pursue his business interests as and when he felt was appropriate (albeit that these interests were to the mutual advantage of all of the companies in the group).

### *The integration test*

[13] Mr Broad, through his company, was part of a complicated network of companies each of which referred business and revenue to the others. I do not except that he, personally, was integrated into the day-to-day business of the respondent. His relationship with Financial Gain Limited was a business relationship.

*The fundamental test*

[14] This test asks the question "was Mr Broad in business on his own account?" The resounding answer to this question must be "yes". Mr Broad, via the vehicle of the company which he owned, entered a relationship with a group of companies controlled by Mr Rota with the express purpose of conducting a financial services business. He entered into this relationship with the clear intention of maximizing the profits he could earn by using the established network of companies and contacts available through Mr Rota's group of companies. Mr Broad was in business on his own account.

*Industry practice*

[15] Mr Broad has not disputed Mr Rota's contention that contacts for services are common in the financial services industry. Although industry practice is *far from determinative* Mr Broad was familiar with the industry and entered into a relationship with Mr Rota's group of company's with which he was familiar and, apparently, comfortable.

**Determination**

[16] **For the reasons set out above, I find that the real natural of the relationship between Mr Broad (or more accurately Mr Broad's company, Financial Concepts Ltd) and Financial Gain Ltd was a contract for services. Mr Broad was an independent contractor, not an employee of Financial Gain (Auckland) Ltd. He is not able to pursue his claims in the Employment Relations Authority.**

**Costs**

[17] As neither party was legally represented in this matter there is no question of costs to be determined.

James Wilson

Member of the Employment Relations Authority