

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 316/07  
5085918

BETWEEN CLARA FEO, DALIA  
BARLOW, JAMIE WYBRO,  
JAROSLAV BOTKA,  
LEMAPU CRYSTAL KAREN  
YOUNG  
Applicants

AND TECHNOLOGY UCAN  
TRUST LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: J Bale, advocate for Applicants  
M Reid, advocate for Respondent

Investigation Meeting: 27 July 2007 at Auckland

Additional material received: 1 and 3 August 2007 from Respondent

Determination: 11 October 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Clara Feo, Dalia Barlow, Jamie Wybro, Jaroslav Botka and Lemapu Crystal Karen Young all say they have personal grievances against Technology Ucan Trust Limited (“TUTL”).

[2] There was no dispute that Ms Feo was an employee of TUTL, but the company says the other four applicants were independent contractors. Accordingly this determination addresses whether Ms Barlow, Ms Wybro, Ms Young and Mr Botka were employees or contractors.

[3] If Ms Feo's personal grievance is not resolved, the Authority will proceed to investigate it pursuant to arrangements yet to be made. If any or all of the remaining applicants are found to be employees a similar approach will apply, but if any or all of them are found to be contractors then the Authority cannot take their grievances any further.

### **The parties' agreement**

[4] TUTL is in the business of selling and servicing Kirby vacuum cleaners and accessories. It engages salespeople to carry out the selling door to door, and says these salespeople are independent agents, or contractors, not employees. The four applicants whose circumstances are being addressed here were engaged as door to door salespeople. Ms Feo's circumstances are different because she was employed as an in-house telemarketer.

[5] The company's approach to recruiting salespeople, including the applicants, was in general to publish broadly-worded advertisements offering the opportunity to earn a specified sum of money per week, with no experience necessary. Each of the applicants responded to an advertisement of this kind.

[6] After an initial interview process - during which the product, aspects of the pay structure and the duties were discussed - suitable applicants would be called back to attend an unpaid three-day training and induction course. During the course applicants would receive (among other things) training in how to demonstrate and use Kirby vacuum cleaners, and there would be more detailed discussion of the terms and conditions of the parties' arrangement.

[7] All four applicants here attended such a course. The pay structure was discussed in some detail, as was the existence of travel incentives for those who met specified targets.

[8] All four applicants signed a standard 'independent agent agreement'. The contents of the agreement were discussed with each of them before they signed. The discussion included explanation of the need to retain receipts to support expenses that

may be deductible from the incomes for tax purposes. The agreement included the following provision:

“4. The Independent Agent is not an employee of the Company and nothing herein shall imply otherwise. The Agent is therefore entirely free to choose his/her own legal method of sale, territory, hours of work, customers and may act personally or delegate and the Company retains no right of control over the Independent Agent.”

[9] There was also a provision stating the agent had no authority to represent the company other than to obtain orders on its behalf.

[10] The document also set out the pay structure. There were two options. One was a ‘straight commission’ under which the ‘car crew’ and the ‘van crew’ respectively would receive commissions at the specified rate on completed sales.

[11] I infer the ‘car crew’ were people who used their own vehicles to carry out their duties. Car crew members’ commissions were calculated with reference to whether they had generated their own leads on particular sales, or whether the company had provided the leads. For the former the commission was 15% of net monies received, and for the latter the commission was 10% of net monies received.

[12] The ‘van crew’ were those who did not have their own vehicles. They were transported in teams, in company vehicles. It does not appear any charge was levied on them for this transport. A ‘van master’ would do the driving, and it was apparent that van masters also had a support and management role in respect of the people they were driving. Van crew members’ commissions were not calculated with reference to the source of the relevant lead, rather on a sliding scale of 8-15%, depending on the amount of the resulting ‘deal’. Crew members were permitted to negotiate the sale price above a base level, but a relatively lower price would result in relatively less commission.

[13] At the relevant time Ms Young had been appointed as a van master, although her change in status had not been reflected by the completion of a new written agreement. Among other things, van masters were entitled to further commission on qualifying sales made by the members of their van crew. Otherwise neither Ms

Young nor the other three applicants owned their own vehicle and all were members of the 'van crew'.

[14] The second payment option was a retainer based payment available to both the car crew and the van crew. People who completed a demonstration to customers which covered all 5 'high points' identified by the Kirby organisation qualified for a flat payment for the demonstration. Flat rate payments in respect of financed purchases were also set out.

[15] Finally, the written agreement listed the items provided to salespeople in the 'demonstration kit', and made provision for monthly deductions from pay and other matters in respect of TUTL's insurance arrangements. The demonstration kit included the company's carpet shampoo system and some accessories, all of which were issued on consignment.

[16] All four applicants had withholding tax deducted from their incomes.

### **The relationship in practice**

[17] Clause 4 of the agreement purports, in effect, to identify the aspects of the parties' arrangement which support its status as one between a principal and an independent contractor. It refers to the freedom to chose:

- . a legal method of sale;
- . territory;
- . hours of work; and
- . customers.

[18] The clause asserts further that agents may act personally or delegate, and that the company retains no right of control over the agent.

#### **(a) Method of sale**

[19] The method of sale the agents used was to knock on the doors of private residences, seek admission to the premises for the purpose of demonstrating the

company's product, and attempt to close a sale. There was no real choice about that. Moreover, to be entitled to the retainer-based payment agents were obliged to cover the five 'high points' with a potential client. Not only were these 'high points' very prescriptive, such tight control was exercised over them that agents would telephone the company office in the course of a demonstration to confirm that particular points had been covered. There was no real choice about the content of the presentation.

[20] However the requirement that salespeople follow a scripted sales pitch is not uncommon even when the salesperson is a contractor. This is particularly so when the salesperson is inexperienced, and access to a script is a useful support.

(b) Territory

[21] As members of the 'van crew', in practice Ms Barlow, Ms Wybro and Mr Botka were expected to advise whether and when they required transport. Particular vans tended to cover particular areas. Members of the crews were free to choose the area in which they wished to work, but the applicants here tended to work consistently on the same crew and with the same van master. From time to time they did, however, choose to work in different areas, and would be driven by a different van master if they did so. There was nothing to suggest that Ms Young did not enjoy similar freedom to choose where she worked.

[22] Freedom to choose the place of work is not usually available to an employee.

(c) Hours of work

[23] The group nature of the van transport arrangements meant there was an expectation that, once the crew member concerned had indicated a wish to work in a particular area on a particular day, the crew member would attend at the place and time nominated for a pickup.

[24] I do not accept that the mere fact TUCL sought advance indications of crew members' plans in that respect, or expected crew members to adhere to those arrangements unless they advised otherwise, indicates a degree of control consistent with an employment relationship. That sort of arrangement is reasonable and

sensible in the interests of efficient and effective operation for all concerned. The applicants complained of various instances in which they had been required to account for certain absences, but for the most part the complaints arose out of failures of theirs to communicate their intentions when they should have done so. Otherwise there was no evidence that any of them were required to work any specified hours.

[25] Such arrangements are indicative of a relationship of principal and independent contractor.

(d) Customers

[26] Despite the ostensible freedom to choose customers, there were limits on the freedom in the case of the van crew. Some limits followed inevitably from the group nature of the transport. However there was a conflict in the evidence over the extent to which agents could be obliged to walk down any particular street and knock on doors for the purpose of gaining entry and conducting a sales demonstration. The company maintained that agents were free to choose not to approach a particular house or street, while the applicants insisted that pressure was put on them to ensure the area in which they were working was thoroughly covered. If they had doubts or were reluctant to knock on a particular door themselves, it was part of the van master's role to 'knock them in'.

[27] I was told that the principal methods of obtaining customers were through agents following up either their own leads, or leads supplied by the company. However it seemed to me that, with the possible exception of Ms Young, the applicants were dependent on obtaining leads from their van master. At the same time that seemed to flow from the applicants' lack of experience and maturity, rather than from any restriction arising from the terms of their agreement.

(e) Right to delegate

[28] Clause 4 also refers to the ability to act personally or to delegate. Such a provision in general is indicative of a relationship of independent contractor and principal. Here all of the applicants acted personally. No issue of delegation arose.

## (f) No right of control

[29] Clause 4 declared that the company retained no right of control over the independent agent. Such a declaration carries no weight if it is not supported by the rest of the agreement or by the reality of the relationship in practice. I return to that matter in discussing the application of the legal tests for identifying whether a relationship is one of employment or not.

**Determination**

[30] Section 6 of the Employment Relations Act 2000 addresses the approach to be taken in deciding whether a relationship is one of employer and employee, or principal and contractor. Relevant provisions read:

“(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2) 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.”

[31] The leading case is the judgment of the Supreme Court in **Bryson v Three Foot Six Limited**<sup>1</sup>. The following passage, expanding on s 6(3)(a), is particularly relevant:

“[32] “All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or Authority to have regard to the features of control and integration and to whether the contracted person has been effectively working

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<sup>1</sup> [2005] SC 34

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 will usually be possible to examine the relationship in light of the control, integration and fundamental tests. ... In the passage of her reasons quoted in para [5] above, Judge Shaw accurately states what the Court must do and lists the matters which are relevant. ... The only criticism which might fairly be made of the Judge's list is that it does not expressly address attention to the substantive contractual terms ...”

[32] Paragraph [5] of the Supreme Court's judgment quoted the Employment Court judge as follows:

“[5] ...

- . The Court must determine the real nature of the relationship.
- . The intention of the parties is relevant but no longer decisive.
- . Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- . The real nature of the relationship can be ascertained by analysing the tests that have historically been 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.”

[33] Thus, for example, the fact that the standard independent agency agreement specifies that the agent is not an employee is relevant, but not decisive. If I accept, as I do, that the relevant clause was discussed by the parties at the time of entry into the respective agreements, and that it reflected the intention of the parties in each case, that fact is also relevant but not decisive.

[34] To review the indicators in the agreement overall, on the face of the document provisions such as clause 4 in particular point to the true nature of the relationship being one of principal and contractor. Clause 4 will, however, be further considered in the light of the extent to which it reflected the relationship in practice. The absence of provision for sick leave and annual leave further points to the relationship being one of principal and contractor.

[35] The lack of authority to represent the company on the part of the agent can indicate a relationship of principal and contractor rather than employer and employee, although many employees are not authorised to represent their employer either.

[36] I find the payment system, the notice provision and the nature of the duties contracted for are neutral when assessing the nature of the relationship<sup>2</sup>.

[37] That TUCL retains ownership of the demonstration kit, and there is no obvious leasing or rental arrangement in respect of it, is more consistent with an employment relationship. On the other hand the agent's obligation to make payments in respect of insurance is more consistent with a relationship of principal and contractor.

[38] There was no evidence that any payment was levied in respect of the van transport. That is consistent with the relationship being one of employment.

[39] I give little weight to the applicants' tax positions. At most the tax treatment of their income is consistent with the assertion that they are contractors. Otherwise the circumstances here are very different from those in which an individual - whether as a sole trader or through a trust or company - deliberately structures his or her affairs with tax implications in mind and operates accordingly.

[40] Overall I conclude that on its face the written agreement amounts to more than merely an attempt to label the arrangement, is more strongly indicative of a relationship of principal and contractor than of employment, and should be given weight as a genuine reflection of the parties' intentions.

[41] In order to further consider the real nature of the relationship I turn to the control, integration and fundamental tests.

(a) Control

[42] TUTL exercised a relatively high degree of control over the way the sales pitch was conducted. That does not of itself mean the relationship was one of

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<sup>2</sup> The mere fact that remuneration is paid on a commission-only basis does not mean the relationship in question is necessarily one of principal and contractor - all relevant matters must be considered.

employment, since it is in the interests of both parties to act to ensure the efficient and profitable conduct of the activities of both.<sup>3</sup>

[43] The company conducted daily sales meetings, with a further meeting on Saturdays. Attendance at the Saturday meeting was obligatory for those who wished to participate in the travel incentive scheme. Not everyone had that wish. Accordingly there was an element of choice regarding attendance at sales meetings, lessening the element of control.

[44] I have already discussed the extent in practice of the freedoms set out in clause 4. These factors are relevant to the degree of control exercised over the agents, and on balance I find that they are indicative of a relationship of principal and contractor. I find in particular that while control was exercised over the agents, the extent of it was not sufficient to outweigh the freedoms also conferred.

(b) Integration

[45] I do not find this test helpful here. At best the evidence tends to indicate that the applicants' work was done for the TUTL business but was not integrated into it.<sup>4</sup>

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<sup>3</sup> **Cunningham v TNT Express Worldwide Limited** [1993] 1 ERNZ 695 (CA)

<sup>4</sup> Compare the decision of the Employment Court in **Bryson v Three Foot Six Limited** [2003] 1 ERNZ 581, where Mr Bryson's work was found to be collaborative and based on teamwork. Commission-based selling has elements of this, but ultimately the seller is on his or her own.

(c) Fundamental

[46] With the exception of Ms Young the applicants themselves did not appear to approach their work as if they were running a business on their own account. However that was not because of any limits or restrictions in the respective agreements. The applicants are young and inexperienced, and I have profound reservations about the wisdom of TUCL engaging such inexperienced people for the kind of work in question. Ms Young, however, was progressing well enough to be offered access to further business opportunities in the Kirby franchise.

[47] I therefore conclude that the relationships in question were not employment relationships. The Authority cannot take the associated grievances any further.

**Direction to mediation**

[48] For the avoidance of doubt, TUCL is now directed to mediation in respect of Ms Feo's grievance. Mediation is to take place within 28 days of the date of this determination.

[49] My conclusion on the status of the other four applicants means this direction does not apply to their circumstances.

**Costs**

[50] Costs are reserved. If either party seeks a contribution from the other to the costs of this application the request, together with reasons, is to be filed in the Authority and copied to the other party within 28 days of the date of this determination. The other party shall have a further 7 days in which to file a written response in the Authority and copy it to the other party.

R A Monaghan

Member of the Employment Relations Authority