

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Arthur Cooper Gyles (Applicant)
AND Thumbprint 2 Limited (Respondent)
REPRESENTATIVES David Patten, for the Applicant
Andrew Bell, for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 27 April 2006
SUBMISSIONS 27 April 2006 tabled by the Respondent
18 & 19 May 2006 from the Applicant and
29 May 2006 from the Respondent in Reply
DATE OF DETERMINATION 5 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. This is an employment relationship problem filed in the Authority about Mr Gyles' status at Thumbprint 2 Limited ("Thumbprint") and any dismissal. Mr Gyles says he was an employee and the directors of Thumbprint say that he was a contractor.

The facts

2. Mr Gyles commenced working at Thumbprint on 27 April 2005 following discussions with Stephen Dawson, company director, in regard to the role and conditions for Mr Gyles to work at Thumbprint. The two of them had regard to a letters dated 30 March 2005 from Mr Gyles to Mr Dawson and a letter prepared by Mr Gyles dated 22 April 2005 that was a contract to work at Thumbprint. The terms and arrangements pertaining to the first letter did not go proceed as planned. The applicant says he then entered into an employment agreement with Thumbprint under the terms in the second letter for *a renewable* 12 months and was appointed as "General Manger".

3. Mr Gyles says he took on the responsibility for a “general management” function with Thumbprint. The second letter outlined the position he was required to work, involving management activities, administration activities, specialist project activities, documentation activities and employment, legal and accounting matters. The second letter also provided for him to liaise with shareholders and directors in matters of strategy development, preparation and maintenance of projection financial scenarios and historical financial reporting in association with Thumbprint’s accountants. The second letter confirmed that he would commence work on 26 April 2005, work hours between 8am and 7pm daily during weekdays and he anticipated that he would work or provide 6.5 to 8.5 hours work per day. The second letter provided for four standard weeks holiday plus one additional week per week plus statutory holidays.

4. I quote from the letter:

“I will render an account monthly, in the name of Corporate Publishers Limited at a rate of \$5,833 plus GST monthly for payment weekly by auto payment. This fee rate will be reviewed annually. As discussed, I will be entitled to six monthly reviews of the business’s profitability. I suggest a formula commonly expressed as EBIT and Drawings and Debt (earnings before interest, directors’ drawings, depreciation and taxation). This measure of business activity identifies contribution, prior to items that the Directors may wish to add into the expenses mix for personal reasons. All EBIT and Drawings and Debt from the current level, from 1 Ma6 2005, would result in payments to me at a rate of 3% during the period. Any barter card sales are to be excluded from the sales figures.

I will not seek a directorship of your business, but to be totally effective I would require access to all financial and contract pricing information related to Thumbprint 2 Limited.

In addition I would require vehicle expense compensation at 0.63c per kilometre for ‘to and from’ work and for business mileage. To this end, I will keep a three months’ mileage log book to establish an average for future reimbursement.

I will be recompensed for use of cellphone for activity during working hours and including email access and broadband at the 200mb rate. Should usage increase over this level then the byte rate will increase to compensate for the increased volume. These costs will be invoiced monthly.

As I will be treated as an independent contractor, my fee therefore would be rendered with GST added.

To provide you with a resource that will initiate an expansion of Thumbprint 2 Limited business systems and business activity within four months, this agreement will be on a fixed ‘renewable’ 12 months commercial services relationship.

This arrangement will not require an employment agreement as such, but in accepting your invitation, Thumbprint 2 Limited will undertake to provide me with a minimum of 12 months' continuous work commitment.

In accepting this role I would be exempt from accepting any other paid employment during the period other than my involvement with Digital Direct."

5. Stephen Dawson, supported by his father, Alan Dawson a company director and shareholder, say that this letter makes it clear that the label put on Mr Gyles' employment with the company was a contractor. Mr Gyles does not accept this. He says the arrangement was made for his wages to be paid through Corporate Publishers Limited (his own company) so that his wages would be more than they otherwise would have been if paid with PAYE tax directly from Thumbprint. This explanation was rejected by both Messrs Dawson.
6. Stephen Dawson accepted the offer contained in Mr Gyles' letter:

*"Cooper Gyles
9A Hay Street
Oriental Bay
WELLINGTON*

I accept this offer in all respects and confirm to you our order to proceed with the contract for services as outlined above.

*Yours faithfully,
Steve Dawson"*

7. During the period that Mr Gyles worked at Thumbprint he considered that he had the role of "General Manager" and was an employee. He has submitted a company flyer, web navigation chart, job advertisements, PD for production team leader, a copy of a work reference from a Mr David Hurst a former employee, that support him calling himself a "general manager" in the business.
8. Mr Gyles says that on 1 May he was introduced to all staff as the new "general manager" and what his role would be. He has used a written statement from David Hurst, the former employee, to support his position and what he says Mr Steve Dawson said at that meeting. Mr Hurst did not present himself at the investigation meeting despite being summonsed that has apparently been served¹.

¹ Although it was anticipated by the applicant that Mr Hurst would be summonsed, a summons executed by the Authority for the applicant was not served (see Letter dated 18 May 2006 for explanation).

9. The Authority heard from Mr Stephen Dawson and Mr Alan Dawson and another former employee, Louise Cooper. The only thing that Mr Steve Dawson says he said was that he welcomed Mr Gyles and that he was there to advance and take the company forward.
10. Mr Gyles has produced a document of his holidays and sick and special leave to support his contention that he was an employee. These were not kept as a formal record at his place of work but held by him personally. He told the Authority that he held them personally because of the shambles of the business's records and that the nature of his employment was such that it would not be inconsistent as the general manager for him to maintain these personally.
11. Mr Gyles also presented a critical path plan for his 12 months commencing in May, a critical objectives list of project activities and deadlines prepared on 15 May to support the range of roles and activities he was undertaking in his position.
12. It is common ground that Mr Gyles' relationship with Stephen Dawson deteriorated and that that deterioration in relationship was reported on by Mr Gyles to shareholders on 2 June 2005.
13. Another document produced is an email dated 10 January 2006 about the purchase of a motor vehicle:

*“From: Corporate Publishers
Sent: Friday, 10 June 2005 9:31 a.m.
To: Steve Dawson
Subject: Motor vehicle purchase*

Steve,

Since you brought up with me this afternoon the issue of a car supplied by yourself, I have considered the issue in detail. At this time I am unwilling to move on that front.

My reasons are:

I am an individual contractor and wish to stay exactly in that format. We have a written contract and am not interested in breaking that agreement at this time.

Until we embed our relationship into a longer term relationship with a high level of certainty for the future this change from a contract status does not suit me.

The estimated annual all-up cost to Thumbprint is around \$4,500 as I originally estimated.

The business does not need another unnecessary asset.

The cost of ownership and operation is the same as using my car.

Cooper” (Emphasis added)

14. Mr Gyles says that a new car from the company would not have satisfied his needs because the car was old, dilapidated and had high mileage and did not fit with the position's standing compared with the use of his own personal vehicle that he was using through Corporate Publishers Limited.

15. On Friday, 5 August 2005 Mr Gyles sent a memo to Steve Dawson in regard to their relationship and the difficulties which he was experiencing with Mr Dawson's style of management and engagement, particularly in regard to any collegiality. On 10 August 2005, Mr Gyles was given by Mr Steve Dawson a letter of termination of services. This letter reads as follows:

*“10 August 2005
Attention: Cooper Gyles*

Re: Termination of Services

We write to give notice that Thumbprint 2 Limited no longer requires the services of Corporate Publishers Limited. We therefore give 15 days notice of termination of the contract between Thumbprint 2 Limited and Corporate Publishers Limited, being notice period corresponding to the employ cycle of Corporate Publishers Limited.

*Yours faithfully,
Steve Dawson
Managing Director”*

16. Mr Gyles says that this came as a complete shock to him and from that point ceased his involvement with Thumbprint.
17. Incidentally, through the period of the engagement, tax invoice statements were rendered and payments made in regard to various sums for the contract for services on a monthly basis, disbursements for mileage, data access and on one occasion the reimbursement of a fan heater supplied by Mr Gyles for the office. The invoices included payments for GST.

Findings

18. It is my decision that Mr Gyles was an employee. My reasons follow.
19. The label the parties put on the arrangement was a contractor (see second letter dated 22 April 2005). However, the real nature of the relationship (applying section 6 of the Act) meant the relationship was quite different, and I hold Mr Gyles was an employee. I am supported in this finding by the following:
- The applicant's responsibilities in his role. What the applicant was employed to do was far more than the work required of a “consultant” as claimed by Mr Steven Dawson. The Applicant was required to act as a manager and run the company. There was an extensive range of duties applying to the position.

- Mr Gyles' introduction when he commenced was consistent with him working in the capacity of an employee. I accept that he was introduced to other employees as the general manager, which while three witnesses could not recall it happening they did not deny that it could have happened.
- Mr Gyles was described by the company as its general manager in marketing and promotional documents (see Company flyer and Thumbprint Web Navigation documents produced).
- Mr Gyles' calling card was designed to the artwork stage describing him as the general manager.
- Mr Gyles was the company's contact person for job applicants applying for positions in the company (copy of job advertisement for Team Leader and screen print operators produced).
- Mr Gyles signed employment agreements for employees and associated position descriptions (applicant gave three examples in his evidence and see position description of production team leader produced).
- Mr Gyles was the main contact at the company and prepared a work reference produced as an example of acting in his role (see reference dated 8 August produced). Steven Dawson says that if he had knowledge of this at the time he would have taken issue with Mr Gyles' authority. There was no supporting evidence produced by Mr Dawson and there were no restrictions placed on the applicant although Mr Dawson says he was the decision maker that Mr Gyles had to report to and thus exercise a measure of control over him.
- The applicant kept his own records of any time taken off during his employment that is consistent with his position and its seniority. This is not determinative.
- Mr Gyles worked at agreed times for the respondent. He had daily hours and had a right to work from home if required. His place of employment was at the company premises. He says he discussed with Mr Dawson the times he worked from home and was contactable if required.

- Mr Gyles agreed not to work for any other organisation during his employment and agreed not to seek any other work. He worked solely for the respondent. It was his only source of income.
- Mr Gyles was required to report to Mr Steven Dawson (see document 14 produced).
- Mr Gyles says he relied upon the company computer and telephone.

20. In weighing the above factors Mr Gyles' position with Thumbprint was integrated into the employer's business in regard to his role and responsibilities and there was a measure of control over his activities as he had to report to Steven Dawson (integration and control tests). I accept that the label the parties put on the arrangement, including the arguments about their intentions for Mr Gyles to be a contractor, had the purpose of enabling Mr Gyles to maximise his earnings rather than Mr Gyles' company providing a service for Thumbprint (Mr Gyles' evidence), and even although Mr Gyles wrote the contract. This distinguishes Mr Gyles being in business on his own account (fundamental test), when he paid his own taxes, invoiced GST and invoiced Thumbprint through Corporate Publishing Limited on a monthly basis. He was not involved in any other activities and he agreed upon entering into the relationship not to undertake any other activities as a condition to work at Thumbprint.
21. Therefore, in taking into account all the relevant matters, I hold, despite the label put on the arrangement by the parties at the time, Mr Gyles was an employee at Thumbprint.

The dismissal and remedies to resolve the employment relationship problem

22. It follows that Mr Gyles' dismissal was unjustified, especially in regard to the procedure followed. The decision was handed to Mr Gyles in a letter where there was no notice and no opportunity for Mr Gyles to have any input and opportunity to comment on the decision made by the respondent. There is no contribution and blameworthy conduct on his part for his dismissal. If there was any underlying performance issue impacting on the company's finances the responsibility rested with Thumbprint to take it up with Mr Gyles properly.
23. Mr Gyles told me of his experience and referred to his knowledge of matters relating to contractual and employment relationships previously. I conclude he is enterprising and taken full advantage of the situation that enables him to make this claim. In particular he put the label on the relationship with a clear statement "*as I will be treated as an independent contractor*". He wrote the contract himself. He explained his reasons for the label put on the

arrangement that involved a clear conflict amongst the witnesses, and upon which the Dawsons were genuine about the arrangement they thought they had entered into with Mr Gyles. Mr Gyles' position during the Authority's investigation was quite inconsistent with the above statement "*as I will be treated as an independent contractor*" and his position adopted in the email to Mr Dawson (document 12), and document 2 (the agreed letter of terms). He has had prior experience as a contractor and a consultant prior to his work at Thumbprint. He acknowledged preparing many other contractor agreements and employment agreements. Therefore I conclude that Mr Gyles has created an ambiguous situation in regard to his reasons for the arrangement and taken advantage of it.

24. He has exploited the inexperience and lack of business and employment acumen of Stephen Dawson. As I must, I award Mr Gyles the sum of three months lost wages, but exercise my discretion not to award him any more in regard to his claimed losses. I do not accept he had a fixed term employment agreement given the provision for annual holidays of 4 weeks plus an additional week per year, the absence of any arrangement to end the agreement, the annual review of pay (at the time referred to as a fee). The agreement had a minimum 12 month period for a term and was "*renewable*". These factors did not make it a fixed term, I hold.
25. Mr Gyles is entitled to lost wages having supported attempts to mitigate his lost wages. He was paid \$70,000 salary per annum. His three months' entitlement is \$17,500. I order Thumbprint 2 Limited to pay Arthur Cooper Gyles this sum under s 123 (1) (b) and s 128 of the Act.
26. Mr Gyles has claimed \$15,000 compensation for humiliation, loss of dignity and injury to feelings. He has not established the claim given that I find that Mr Gyles has taken full advantage of the situation to bring the claim. He was not lacking in being able to be forthcoming when he entered into the relationship and persuaded the Dawsons to take up his suggestion. The claim is simply not credible despite the evidence he led including mitigation of his losses. Indeed his evidence has had quite the reverse impact on me as the situation has been ironically of Mr Gyles' own making and where any financial losses can be covered by the lost wages awarded.

27. Costs are reserved.

P R Stapp
Member of Employment Relations Authority