

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Matthew Lance Tones  
**AND** 3D1 Ltd  
**REPRESENTATIVES** Matthew Young for Applicant  
Ian Matheson for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 1 November 2006  
**SUBMISSIONS** 2 November 2006, 7 November 2006  
**DATE OF DETERMINATION** 23 November 2006

**DETERMINATION OF THE AUTHORITY**

Employment Relationship Problem

[1] The respondent sells three dimensional design software to professional shopfitters and kitchen manufacturers. Although it is a New Zealand company, based in New Plymouth, most of its business has until very recently been in Australia. From June 2006 until September 2006 Mr Tones was engaged as the sole consultant to sell the 3D software product range within New Zealand. He says he was unfairly and/or constructively dismissed from this role, and seeks the usual remedies for his personal grievance. In responding, 3D1 Ltd has said that Mr Tones was an independent contractor, not an employee.

[2] On 1 November I met with the parties to hear evidence on the preliminary issue of whether Mr Tones was engaged under a contract of employment, which will determine whether his employment relationship problem is within the jurisdiction of the Authority. This is the sole issue here.

Contractor or employee?

[3] In May of this year Mr Tones was looking for permanent work in NZ after moving here for personal reasons. He saw advertised on the "Seek" Job Web Site the role of "3D NZ Sales Manager-Software" which was described as a "*permanent contract position...promoting and selling our range of 3D Kitchen design software.*" On 23 May he emailed an application. Chris Adams, director of 3D1, replied by return with more information about the work, including the requirement for the person who took it up to be self employed and GST registered, to meet business expenses estimated at \$10,000.00 per annum, and to supply equipment such as a vehicle and computer. Mr Tones was also told:

*"sales agents will own their territory (the whole of NZ in this case) and will be able to sell this as a going concern in the future subject to certain conditions...*

...

*This becomes your own business and will go as far as you choose to take it."*

[4] During the negotiations which followed Mr Adams told Mr Tones that he would gain a business as a result of establishing the product in New Zealand. Mr Tones told me that, having no idea what being "self-employed" meant in terms of New Zealand law, he saw this as an incentive and no different to the practice of offering share purchase options to staff. On 26 May Mr Adams offered Mr Tones a position and presented a draft agreement for him to look at. Mr Tones advised that he would get his lawyer to look at it. In fact, he did not engage a lawyer. He thought that his partner, a lawyer who had once held a New Zealand practising certificate, would look over it for him, however this did not happen. Instead, Mr Tones himself amended the agreement to better reflect what he understood the agreed terms to be. As Mr Tones put it the contract went "back and forth" a few times before agreement was reached and the document was executed.

[5] The contract was entitled "*Agreement for supply and resale of software*" and was with Mr Tones personally. (His company "Chartered Business Solutions Limited" was incorporated in April 2006.) The label used to describe Mr Tones is "The Reseller." He was to be remunerated by retainer plus commission. The respondent had agreed to rebate its original retainer offer in return for the supply of a vehicle. This was arranged in such a way that over time Mr Tones would become the owner of the vehicle.

[6] The agreement also included the following provisions:

*Clause 5:*

*The Reseller agrees to make a full commitment to the establishment of the agreed software and to ensure through good business practice that the good reputation of the software is upheld..."*

*Clause 6:*

*The territory which The Reseller may resell in is the territory in which the reseller lives...defined under clause 41...*

*Clause 7(e):*

*All costs incurred by The Reseller in gaining sales will be the responsibility of The Reseller...*

*Clause 22:*

*The Reseller may choose to sell or lease or provide hire purchase contracts to the end user. Any such contract must be based on the prices listed in clauses 14 to 20...*

*Clause 23:*

*The Reseller must be active in promoting the agreed software. This agreement may be cancelled if the Reseller does not show a commitment to promotion and sales;*

*(a) It is expected that The Reseller will sell a minimum of 12 standard licences per annum;*

*(b) It is expected that The Reseller will deliver a high level of client satisfaction."*

*Clause 24:*

*The Supplier will supply the agreed software to The Reseller promptly on request. The insurance risk for the software shall remain with the supplier until delivery to The Reseller's nominated address.*

*Clause 25:*

*The Reseller will pay for the software in full in advance with each order made...*

*Clause 26*

*The Supplier will free of charge provide all necessary training and on-going assistance to ensure that The Reseller is competent in installation set up and training of the Agreed software and supporting documents. The cost of training of additional agents who are engaged by the Reseller will be charged to the Reseller ...*

*Clause 33:*

*In consideration of the granting of this license both parties agree that nothing shall create a contract of employment, partnership or joint venture between the parties*

*Clause 36:*

*The Supplier may sell the business of software supply at any time. In this event ...*

*(a) The Reseller will not be entitled to any share of the sale proceeds;*

*(b) The Supplier will ensure by contract with any new owner that The Reseller maintains rights of supply granted under this contract;*

*(c) The region operated by The Reseller will be a commercial asset to The Reseller subject to clause 23 and may be sold to another party subject to agreement by The Supplier- the purchaser must have sufficient industry knowledge and sound business acumen."*

[7] Prices to the end user (and hence commissions) were fixed and were set out in Clauses 8-20. Regarding the lease arrangements referred to in Clause 22 I was told that this required the intervention of a third party finance company. At the end of the lease period, the Reseller could lease out the software again without paying for it again. However the licence for the software never actually passed to the Reseller. In order to use the software the end user entered into an agreement with the Supplier for the licence to pass to the end user.

[8] At Mr Tones's request, the following clause was inserted into the agreement:

*"Neither the Supplier nor any related party shall approach The Reseller's clients for the purpose of cross-selling new or existing products without obtaining The Reseller's written consent."*

[9] Mr Tones had also put forward a draft clause to provide him with indemnity for client claims for loss of profits. Mr Adams told him that this was not necessary as it was covered by the respondent's license agreement, and the clause did not find its way into the final agreement. However, Mr Tones agreed to be liable for any uninsured losses in relation to his vehicle. Mr Adams pointed out to me that indemnity insurance would not be required by an employee.

[10] Mr Adams told me that the principal benefit to the Reseller under the agreement was the right and opportunity to resell. He envisaged the Reseller's territorial rights beginning immediately on execution of the agreement but conceded that there was no consideration specifically for this. Instead the entitlement depended on the Reseller's fulfilment of the other contractual obligations, such as the minimum sales target of 12 licences. Mr Tones also understood that the region would become his asset subject to achieving the targets in clause 23 over a three year period. He told me he would "accrue or earn" the right to the territory. In relation to clause 36 Mr Adams said that if Mr Tones wanted to leave after the territory was well built up, he would find his own replacement and would be able to charge that replacement a fee, because he or she would be walking into established territory.

[11] Mr Adams told me that he never had any intention of employing Mr Tones and made this clear to him. He told me that he has no employees and that all his sales consultants in Australia are self employed. In Australia some of the resellers have engaged or employed additional agents to work in their territory at their own discretion and at their own rates of pay. He says that he understood the "Seek" website to be used by people looking for any type of work, including self employment, and it was the only such website that he knew of.

[12] Mr Tones told me that initially he too had seen himself as self employed, although he professed not to know what this meant. He invoiced the respondent for his services in the name of his company, Chartered Business Solutions Ltd and issued purchase agreements to clients in that name. He made his own arrangements regarding tax. He described himself as self employed in email correspondence to Mr Adams. An Australian associate of the respondent gave evidence to the Authority and told me that in conversation Mr Tones had told him he was "working for himself" but provided reassurances that he was "part of the team."

[13] As time went on, however, Mr Tones felt that things changed. Because his job was on the road he did not have a desk at the office. However he maintained contact with Mr Adams, reporting to him as and when required, and became involved in a range of duties which he says was wider than contemplated by the agreement. This included rejuvenation of the brand (development of new brochures, website, slogans logos and so on) coordinating the respondent's stand at a trade fair, and preparing materials for a sales conference. Despite or in addition to what was provided in the written agreement, the respondent paid accommodation and travel costs associated with Mr Tones's attendance at events and provided him with business cards and other sales related paraphernalia. He was provided with an email address and his details were included on the respondent's website.

[14] Mr Adams says that the reporting requirements were minimal and that the additional work the applicant engaged in was consistent with helping to build his own business.

[15] In the short time he was associated with the respondent Mr Tones made few sales. Of these, none were prepaid, and for each the respondent generated an invoice to the end user. I was told by Mr Adams that this was because none of the sales attracted a commission and so there was no point in the Reseller generating an invoice for them<sup>1</sup>.

#### Determination

[16] Section 6(2) of the Employment Relations Act 2000 provides that 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.*" Section 6(3) goes to provide that in doing so, the Authority must "*consider relevant matters, including any matters that indicate the intention of the persons*" and "*is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*" In this case, relevant matters include the written agreement, the parties' expressed intentions and the way in which they have implemented their contract.

[17] The written agreement contains a mixture of features, some being commonly associated with employment relationships (such as the payment of a retainer) and others (such as the acquisition of an asset for resale) with contracts for services. In such circumstances the intention of the parties becomes critical.

[18] The respondent's intention has been clearly and consistently expressed. As for Mr Tones, initially (in perusing the "Seek" website) he appears to have been looking for employment. However, he learned of the respondent's desire to enter into a contract of services well before a formal offer was made to him. Mr Tones participated in active negotiations about a range of provisions before the written document was executed. He conceded to me that at the end of that process he considered himself self employed, although he says that he did not know what that meant. I do not find this assertion credible. Mr Tones presented as an articulate, confident and experienced sales person with sufficient experience to turn his mind to matters such as indemnity insurance. I conclude that he had an ordinary understanding of what it meant to be self employed, and intended himself to have that status.

[19] At the time the agreement was entered into, therefore, both parties understood and intended that Mr Tones would be self employed. Given this clear common intention I am satisfied that at its inception the contract was "for services" and not of employment.

[20] This leaves the question whether the arrangements between the parties changed so much in practice that the real nature of the relationship became that of employment. I am not satisfied of this either. The additional work Mr Tones took on was work which had the potential to benefit him as well as the respondent. It was also to his benefit that the respondent paid more of his costs than originally agreed and supplied some sales aids. On their own, these factors do not convince me that the real nature of the relationship changed.

**[21] I conclude that Mr Tones was not an employee and his dispute with the respondent is outside my jurisdiction.**

#### Costs

[22] The matter of costs is reserved. Should either party wish the Authority to determine the issue they have a period of 28 days in which to lodge submissions.

Y S Oldfield  
Member of Employment Relations Authority

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<sup>1</sup> There is some dispute between the parties about what sales would attract commission. I have not attempted to resolve that here as it is not determinative of whether Mr Tones was an employee or not.

