

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 206/07
5076305**

BETWEEN SIMON ROBERT von TUNZELMAN
 Applicant

AND MALCOLM TAYLOR
 First Respondent

 WORDWIDE PUBLISHERS LIMITED
 Second Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 First Respondent In Person by telephone
 Malcolm Taylor for Second Respondent

Investigation Meeting 10 April 2007 and 15 May 2007

Determination: 9 July 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Simon Robert von Tunzelman (“Mr von Tunzelman”) applies to the Authority for an investigation into the termination of his employment. He says he was dismissed without reason and is owed commissions of at least \$40,000.00. The respondents together deny that Mr von Tunzelman was an employee. There is also an issue as to which entity Mr von Tunzelman had a legal relationship with.

[2] There are significant credibility issues in this investigation. Mr von Tunzelman admits to two particular matters of dishonesty on his part in the past. He has given his evidence on oath to the Authority. I have accordingly proceeded to examine each party's evidence very critically and attempted to resolve each area of contention by reference to independent corroboration wherever possible.

The issues

[3] These issues arise:-

- (i) which entity did Mr von Tunzelman enter into a legal relationship with?
- (ii) whether Mr von Tunzelman was an employee; and if he was
- (iii) whether Mr von Tunzelman was dismissed; and if he was
- (iv) whether the dismissal was unjustifiable; and if it was
- (v) what resolution is appropriate to settle the matter.

A legal relationship

[4] Mr von Tunzelman lodged his statement of problem against the first respondent Mr Malcolm Taylor ("Mr Taylor"). Mr Taylor is a director of the second respondent limited liability company Worldwide Publishers Limited ("Worldwide"). Mr Taylor advised the Authority that he was not Mr von Tunzelman's employer but that Worldwide was. I directed that the investigation was to proceed as against both respondents for the matter to be determined.

[5] Mr von Tunzelman had previously worked for Mr Taylor. He agreed to work again for Mr Taylor on the 2007 edition of a publication styled "*Best of the Best*" ("the publication"). But Mr von Tunzelman says that he had no knowledge at all of Worldwide and that this entity was never mentioned to him.

[6] Worldwide is apparently entitled to use the title "*Best of the Best*". Whether or not he knew of Worldwide, Mr von Tunzelman appreciated he was working for the publication although I accept he was given no information or advice as to the entity which owned the publication. I find that Mr von Tunzelman entered into and concluded negotiations for legal relations with Mr Taylor. Mr Taylor did not, in entering into and concluding those negotiations, disclose to Mr von Tunzelman that he was an agent for some other undisclosed principal. There was no contract or any other contemporaneous written record of the negotiations and the agreements reached.

[7] Mr von Tunzelman appreciated he would be working on the publication but he had no idea who was behind the publication he knew as "*Best of the Best*". For all he knew it was owned by Mr Taylor. But in actual fact it was not and Mr von Tunzelman was not to know that. I accept Mr von Tunzelman's evidence that he had no knowledge of Worldwide at the time he entered into contractual relations with Mr Taylor. I find that Mr von Tunzelman was never informed by Mr

Taylor that Mr Taylor was acting on behalf of Worldwide and that Mr von Tunzelman was entering into contractual relations with Worldwide. I find that Mr Taylor failed to disclose to Mr von Tunzelman the fact of Worldwide's involvement at the material time.

[8] According to the doctrine of undisclosed principal, where an agent contracts personally with someone without disclosing that he or she is acting as agent for a company or other legal entity, the agent is liable for any breaches of the contract, in addition to the company. I find that Mr von Tunzelman is entitled to proceed, as he does now, against Mr Taylor personally¹.

[9] I answer the first issue by finding that Mr von Tunzelman is permitted to proceed against Mr Taylor personally in respect of any breaches in the contractual relationship. I also find that Mr von Tunzelman had entered into legal relations with Mr Taylor personally.

Employee or contractor?

[10] It is only if Mr von Tunzelman was an employee is the Authority permitted to investigate and resolve the problem alleged by Mr von Tunzelman. I now determine whether Mr von Tunzelman was an employee.

[11] Mr von Tunzelman says that he and Mr Taylor met and agreed that Mr von Tunzelman would work for "*Best of the Best*" as a sales representative generating leads and converting those leads to sales of advertising in the publication. Mr von Tunzelman is adamant that Mr Taylor agreed to pay him a weekly retainer of \$500.00 nett together with commission of either 10% of total advertising sales or \$40,000.00, whichever was the larger. He says it was on the basis of this remuneration he resigned from his existing employment and was induced to enter into the relationship working for the publication.

[12] Mr von Tunzelman produces to the Authority an unsigned "employment contract" which he says he prepared on his first day of employment 16 March 2006. It records the terms of the relationship Mr von Tunzelman gives evidence of to the Authority. He says he provided this document to Mr Taylor to sign but Mr Taylor declined to do so saying his partner Ms Jane Matthew ("Ms Matthew") was the authorised signatory and she had to sign. Mr von Tunzelman further says the document was never returned to him signed and consequently the terms of the relationship were never recorded in writing.

[13] Mr Taylor vehemently denies the remuneration Mr von Tunzelman maintains and the specimen document Mr von Tunzelman produces. He says that the \$500.00 nett that Mr von Tunzelman was paid weekly was not a retainer but rather was "advance" commission. If I accept that, I must accept that it must have been in advance of something. That something must be an arrangement in respect of commission on advertising sales. Mr Taylor tells the Authority that a document erroneously headed "*Simon 29.8.09*" and prepared by Mr von Tunzelman records the terms of the relationship and the remuneration arrangements. Mr von Tunzelman equally as vehement, denies this and says the document was prepared by Ms Matthew and was rejected by him. I do not accept what Mr Taylor says. I regard it most unlikely that Mr von Tunzelman would write to himself and further, that he would spell his name incorrectly. In any event, I find that the matters recorded in that document were never by agreement with Mr von Tunzelman.

[14] Mr Taylor says Mr von Tunzelman is not owed commission because he did not earn any. But he also says rather oddly, that Mr von Tunzelman was not paid because he did not submit invoices. Those statements are inconsistent. But Mr Taylor does say it was advance commission. It remains undisputed that Mr von Tunzelman was paid commission pursuant to some arrangement. I reject entirely the document marked "*Simon 29/8/09*". I also reject entirely Mr Taylor's statements that Mr von Tunzelman was to submit invoices for payment. I do not regard that evidence as credible. I have no doubt whatsoever that if Mr von Tunzelman had agreed to submit invoices he would have done so if it meant he would have been paid.

[15] When Mr Taylor says Mr von Tunzelman was paid weekly commission in advance, that presupposes an entitlement to commission on a contractual basis. He does not persuade me of what that arrangement was precisely. I do not accept Mr Taylor's evidence that the weekly payment of \$500.00 nett to Mr von Tunzelman was advance commission. I also note that Mr Taylor does not give any evidence of any kind of exercise which calculated the full entitlement commission and setting of the weekly advance commission when the relationship ended.

[16] I prefer Mr von Tunzelman's sworn evidence that he was entitled to a weekly retainer of \$500.00 nett together with a commission the greater of either 10% of his total advertising sales or \$40,000.00. The issue that then arises is to ascertain which was the greater.

[17] Section 6 of the *Employment Relations Act 2000* sets out the tests for determining what constitutes a contract of service. The Authority must determine the real nature of the relationship.

¹ *Cuttance v Purkis* [1994] 2 ERNZ 321, *Cowan v Baggstrom* unreported, WC39/99, Shaw J, 13 July 1999.

The intention of the parties is still relevant but is no longer decisive. The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the fundamental test. I am not to regard any statement by the parties as determinative of the relationship.

[18] Mr von Tunzelman was given his instructions by Mr Taylor and reported to him. Mr von Tunzelman worked from the publication's office. He was required to report to work during specified hours each day. I find that there was significant control imposed on Mr von Tunzelman. This control was exercised by through Mr Taylor over Mr von Tunzelman's work and how and when he performed it. That degree of control over Mr von Tunzelman during his working day was significant and I conclude that such control was characteristic of an employment.

[19] I find too that as an advertising representative, Mr von Tunzelman was an integral part of the publication and his engagement as such was not an adjunct function of Best of the Best's operation.

[20] Mr von Tunzelman worked at offices provided by Worlwide. He was provided with office equipment, stationery and a motor vehicle to perform his duties. I find that Mr von Tunzelman was not operating from the basis of his own business operation and he was not in business on his own account. There is no evidence that he was and nor is it alleged.

[21] I find that Mr von Tunzelman was an employee. I also find that he was employed by Mr Taylor personally because he cannot have been employed by an entity that he had no knowledge of because an employment relationship is a relationship of personal service. Mr von Tunzelman was engaged as an employee working on the publication.

Was there a dismissal?

[22] At about 5.00 pm on Wednesday 25 October 2006, Mr von Tunzelman was drinking with Mr Taylor at Macs Brewbar in Newmarket. Mr Taylor told Mr von Tunzelman "*Mate, you'll need to find another job in about three weeks*". When Mr von Tunzelman asked why, Mr Taylor told him "*because I'm the boss and you work for me and you do what I tell you to do*". Mr von Tunzelman asked if he was being fired and Mr von Tunzelman confirmed he was. Mr von Tunzelman asked about his commission and when he would receive it. Mr Taylor told him he would not be and that what he had done that year was not worth \$40,000.00 commission. Mr von Tunzelman protested but Mr Taylor said he was the boss and could do what he wanted. Mr von Tunzelman terminated

the discussion at that point and arranged to meet Mr Taylor the following morning to discuss matters further.

[23] The following day on Thursday 26 October, Mr Taylor did not arrive to meet with Mr von Tunzelman. Mr von Tunzelman phoned Mr Taylor and asked where he was. Mr Taylor could not meet with Mr von Tunzelman and they arranged to meet the following day. Mr von Tunzelman then telephoned Mr Taylor's partner Ms Matthew at her home and asked her if she knew why he had been fired. She told him she did not know anything about the situation and that it was best he spoke directly with Mr Taylor. On Friday 27 October Mr Taylor did not arrive to meet with Mr Taylor. Mr von Tunzelman continued to telephone him but was unable to make contact with Mr Taylor.

[24] Mr von Tunzelman tried again on the morning of Monday 30 October to contact Mr Taylor. He called Ms Matthew who told him Mr Taylor was in the shower. He asked her to have Mr Taylor contact him. Mr Taylor did phone Mr von Tunzelman at about 9.40 am to ask for details of another appointment he had. Mr von Tunzelman asked why him why he was avoiding Mr von Tunzelman and when were they going to meet to discuss the termination of Mr von Tunzelman's employment. Mr Taylor said he was too busy and would come back the office after his appointment to meet with Mr von Tunzelman. He did not do so.

[25] Ms Matthew attended at the office later that morning. She confirmed to Mr von Tunzelman that he was dismissed and his last day of work would be Friday 10 November 2006. She refused to explain to Mr von Tunzelman why he was being dismissed but did say the publication was wrapping up soon. He asked her about his commission and she said she knew nothing of it and he would need to speak with Mr Taylor. Mr von Tunzelman thanked Ms Matthew for being direct with him and asked her to record the situation in writing. She agreed she would and then left.

[26] Mr von Tunzelman continued to try to speak with Mr Taylor on his cellphone but was unable to speak with Mr Taylor. He decided to confront Mr Taylor directly and intercepted him at the Mink Café in Parnell. Mr Taylor denied any knowledge of Mr von Tunzelman being dismissed. Mr von Tunzelman reminded him of the events of 25 October 2006 but Mr Taylor continued to deny any knowledge. He further disavowed any knowledge of Ms Matthew's confirmation of the dismissal earlier that day. Mr Taylor also denied any knowledge of Mr von Tunzelman being entitled to commission. Later that evening Mr Taylor called Mr von Tunzelman and abused him.

[27] On Tuesday 31 October 2006, Mr von Tunzelman emailed Ms Matthew and requested written confirmation of his dismissal. Mr von Tunzelman has not received any advice from Ms Matthew.

[28] Subsequent settlement discussions did not resolve the commission issue. Mr von Tunzelman left the employment on 10 November 2006.

[29] I accept Mr von Tunzelman's sworn evidence and find that he was dismissed.

Was the dismissal justifiable?

[30] I find that Mr von Tunzelman was dismissed without cause. The dismissal fails to meet the test of justification specified at section 103A of the *Employment Relations Act 2000*. Mr Taylor's actions were not the actions of a fair and reasonable employer. **Mr von Tunzelman's dismissal is unjustifiable.** But he does not seek any remedies in relation to this claim. There will be no orders accordingly in relation to it.

Commission

[31] I find that Mr von Tunzelman is owed commission. He is either owed 10% of his total gross sales or \$40,000.00. I am unable to say which, without knowing the total gross sales and the only appropriate course is to ascertain the precise entitlement. **Malcolm Taylor and Worldwide Publishers Limited are ordered to supply this information to the Authority within 14 days of this Determination.** I will determine the quantum thereafter in a further supplementary determination.

Leon Robinson
Member of Employment Relations Authority