IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEMPC 29
CRC 10/10

IN THE MATTER OF	proceedings removed
BETWEEN	BARRY EDWARD BRUNTON Plaintiff
AND	GARDEN CITY HELICOPTERS LTD Defendant

Hearing: 29 and 30 November and 2 December 2010
(Heard at Christchurch)

Counsel: Julian Moran, counsel for plaintiff
Neil McPhail, advocate for defendant

Judgment: 31 March 2011

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff's personal grievance claim has been removed to the Court by the Employment Relations Authority.[1] The preliminary issue for determination at this hearing was whether, at the time his employment ceased, as Operations Manager – Fixed Wing with the defendant, the plaintiff was an employee under a contract of service, or an independent contractor, under a contract for services. The merits of the plaintiff's claim, that he was unjustifiably dismissed, were not examined. However, the evidence to determine the plaintiff's status was extensive with four Eastlight folders of agreed documents, the plaintiff alone giving evidence for one and three quarter days, and the hearing occupying three full days.

[1] CA 54/10, 9 March 2010.

Legal Principles

[2] It was common ground that the preliminary issue as to the plaintiff's status was to be determined under the provisions of s 6 of the Employment Relations Act 2000 (the Act), the relevant portion of which reads:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, employee—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> (b) includes—
>
> (i) a homeworker; or
>
> (ii) a person intending to work; but
>
> (c) excludes a volunteer who—
>
> (i) does not expect to be rewarded for work to be performed as a volunteer; and
>
> (ii) receives no reward for work performed as a volunteer.
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) 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 their relationship.
>
> …

[3] The leading case on this section is the Supreme Court decision in *Bryson v Three Foot Six Ltd (No 2)*.[2] I have also found assistance from the decision of Chief Judge Colgan in *Singh v Eric James & Associates Ltd,*[3] which confirms that the enquiry in each case is intensely factual and sets out the following principles derived from the *Bryson* case which include:[4]

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[2] [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.
[3] [2010] NZEmpC 1.
[4] At [17].

- Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

- The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine "the real nature of the relationship between them": s 6(2).

- The Authority or the Court must consider "all relevant matters" including any matters that indicate the intention of the persons: s 6(3)(a).

- The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s 6(3)(b).

- "All relevant matters" 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.

- "All relevant matters" will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

- "All relevant matters" include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

- Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

- Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.

- Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

- Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

Findings

[4] The defendant operates the Christchurch based Westpac Helicopter Service and also, through its fixed-wing division, the New Zealand Flying Doctor Service. The latter involves making urgent patient transfers to and from hospitals and organ and New Zealand Blood Service transfers. It also provides urgent air transport for the police, military and for search and rescue purposes. The plaintiff's working life has been spent in the aviation industry. He worked as an air traffic controller and supervisor for the Ministry of Transport and Airways Corporation of New Zealand between 1975 and 1993. He holds a commercial pilot's license and an airline pilot's license. He has extensive flying experience in a number of different aircraft types. He has served on the board of the New Zealand Airline Pilots' Association (NZALPA) and, as a consequence, became familiar with the applicable employment legislation and the civil aviation requirements. As an air traffic controller he has also controlled a number of major air shows.

[5] In early 1994 he met John Currie the managing director of the defendant. When the defendant purchased a twin engine Cessna with the intention of operating a fixed-wing air ambulance service, the plaintiff became involved.

[6] It is common ground that the plaintiff's first work for the defendant was not as an employee. It was agreed that he would fly the Cessna as and when required, subject to his availability, on fixed hourly rates depending on whether it was a single or dual pilot operation.

[7] From the outset, and throughout the entire relationship, the plaintiff's work for the defendant was invoiced by the plaintiff, with GST included, in the name of

Carbine Services Limited ("Carbine"). This company was incorporated on 18 January 1994 with the plaintiff and his wife as the directors and equal shareholders. Some invoices omitted the "Limited" and showed simply as Carbine Services.

[8] The first of a series of written agreements was signed on 6 April 1995 and was described, as were all subsequent agreements, as a "contract for service". It was between the plaintiff and the defendant. Payment was to be on GST invoices. That agreement was to remain in existence for a period of six months. The parties subsequently signed a further contract for service dated 25 October 1995 for an initial three month period, subject to review on 20 January 1996. It contemplated a payment on a GST invoice "for the coordination of the aircraft activities". This coincided with the launch of the fixed-wing air ambulance service business of the defendant. For the first time, the plaintiff was described in the agreement as "Contractor" and his role included flying duties and carrying out the co-ordination of the fixed-wing aircraft operational activities.

[9] At this time the defendant also engaged four other fixed wing pilots, each as independent contractors. Mr Moran, counsel for the plaintiff, accepted that there was no argument that the relationship between the plaintiff and the defendant pursuant to these contract documents was one of principal and independent contractor.

[10] In the period between July 1995 and April 1997 the plaintiff worked as an independent contractor as a personal assistant to the Chief Executive of the Scenic Circle Group of companies.

[11] The plaintiff gave evidence that by mid-1997 he was finding the demands associated with managing his two roles increasingly difficult and he ceased working for the Scenic Circle Group. He was also becoming concerned, he said, about the demands of the air ambulance role and he recorded these in a letter to Mr Currie, dated 26 May 1997, in which he complained about the lack of assistance and recognition for his work and sought an increase in the "amount of the retainer".

[12] The plaintiff prepared a draft contract, described as a "contract for service", which he claimed was for the purpose of discussing these matters with Mr Currie. In that document he describes himself as "Barry Brunton, Director, Carbine Services, (The Contractor)". The plaintiff claimed Mr Currie dismissed the draft agreement and wanted to do things his way. Mr Currie said in evidence that he had never seen this document.

[13] The plaintiff then claimed that when he met with Mr Currie in late 1999, he told him that he was resigning and this had the effect of grounding the air ambulance service. He claims that they met the next day and Mr Currie told him that if the plaintiff agree to return to work, the defendant would employ an additional pilot, that the plaintiff would be given the same terms as the new pilot and, in particular, the plaintiff would be granted four weeks paid annual leave, sick leave and pay for public holidays with days in lieu. The plaintiff claimed that because these new arrangements went a long way towards what he was seeking, he agreed to continue to work for the defendant.

[14] The plaintiff claims that if he had to identify a point at which his position had clearly changed from that of being a contractor to that of an employee this would have been it.

[15] Mr Currie denies that he ever had such a meeting with the plaintiff. His evidence was that during his whole business life he had never failed to accept a resignation when offered by an employee because that indicates that the person's heart is not in the business and therefore the person should not continue. He claims that if Mr Brunton had threatened to terminate his contract with the defendant he would have accepted that termination immediately but that Mr Brunton never did so. The resolution of this conflict bears on the issue of whether there was a change at this point in the plaintiff's employment status. I will resolve it after I have canvassed the subsequent events.

[16] The new pilot employed at the beginning of 2000 was an independent contractor and billed the defendant for his services through a limited liability

company. In May 2002, that person changed his status to employee, went onto salary and signed the appropriate taxation forms.

[17] None of the matters that the plaintiff claims were agreed with Mr Currie were reduced to writing in either correspondence or in the form of a contract of service. However, it does appear that from the end of 1999, the plaintiff included time off for himself, by way of paid leave, in the rosters he prepared. The plaintiff continued to render GST invoices through Carbine but took and received paid leave on the duty rosters.

[18] In 2000 the defendant's role became that of fixed-wing operations manager and the defendant's air ambulance service continued to grow in size and reputation.

[19] In or about May 2002, according to the evidence of Simon Duncan, the defendant's General Manager he decided it was appropriate to update the contract for service between the defendant and Carbine because it referred to the plaintiff and yet all the financial dealings were through Carbine. He drafted a more comprehensive contract for service with a heading "INDEPENDENT CONTRACTORS FORM", showing the parties as the defendant and "Contractor: Barry Brunton/Carbine Services". The first paragraph of this document states:

> This agreement does not constitute an employment contract, for service in an employee role. The contractor acknowledges and agrees, they are responsible for their own payment of taxes, levies and charges under the Income Tax Act, and ACC payable in New Zealand.
> Where the Contractor is GST registered, these charges referred to [herein], are deemed exclusive of GST, unless agreed otherwise.

[20] The plaintiff did not sign this document and gave evidence that, in his view, it did not correctly record the terms and conditions that had been agreed with Mr Currie and which applied in respect of his position.

[21] Mr Duncan produced a further version, with what he said were minor changes, including a monthly contract rate rather than daily rate and which specified the contractor as "Barry Brunton trading as Carbine Services" and was also headed "INDEPENDENT CONTRACTORS FORM".

[22] This contained an identical first paragraph, recording that it did not constitute an employment contract.

[23] The plaintiff's evidence was that this document again did not reflect what had been agreed in respect of annual leave, sick leave and public holidays and that he did not agree that he was an independent contractor. There is no evidence that he expressed these reservations, especially about not being an independent contractor, to the defendant in any way. He did, however, sign the agreement and explained that action in these terms:

> Whilst less than ideal, I decided that it was better that I have at least something in writing in respect of employment terms. I also particularly recall that Simon Duncan was adamant that he wanted consistency across the company's documents of this sort and so he was opposed to making any changes. However, I did not believe that me signing the document changed the "reality" of what my position was, if this were ever to be put to the test.

[24] I do not accept that evidence for the reasons I will later give.

[25] The plaintiff claims that it became a matter of concern to him over a period of time that the defendant was "unwilling to formally acknowledge that my position was an employee". He claims to have taken steps to investigate the legal position and expressed concerns to his accountant. He was told that because he had a single and repetitive source of income for tax purposes, he may be regarded as an employee and not an independent contractor and that if he was to become an employee with PAYE deducted, a substantial increase of about $9,000 per annum would be required to achieve parity. He claims that he had difficulties in negotiating such matters with Mr Currie or Mr Duncan.

[26] There are, however, no examples of any written correspondence from the plaintiff to the defendant expressing his wishes to change status or to have his true position as an employee acknowledged. The evidence, as will be seen, is to the contrary.

[27] Messrs Duncan and Currie gave evidence that in mid-2007 Mr Currie discovered that Carbine had unilaterally increased the contract rate and the plaintiff

had adopted a practice of taking annual leave, which Mr Currie considered was inconsistent with the plaintiff being a contractor.

[28] As a result, Mr Duncan sent an email to the plaintiff on 10 July 2007 in which he stated that Mr Currie had come across an account which showed an increase in the contractor rate from $350 per day to $375 per day and that:

> Whilst the rate thing isn't unreasonable, it's how we got there, that we are bewildered about?
>
> If we consider that 20 days per month at $375 = $90,000 pa, this is what we would consider the going rate for an Ops Manager on PAYE, having regard to the leave provisions.
>
> The other thing is, that being an Independent contractor, there is no provision for annual leave. AL applies to employees on PAYE. We know you have been taking leave, as if on PAYE, so we need to straighten this one out.
>
> …
> Can you make a time with me to go through this, and work up a mutually satisfactory arrangement.
> With Kiwi Saver, Is it worth while you going on PAYE?
> Would you be better off under PAYE, actually getting annual leave?
>
> Let me know what suits?

[29] There was no response from the plaintiff and Mr Duncan wrote another email on 7 August 2007 stating: "We need to sort this Contracting/PAYE issue out for you, as soon as you are available (and can stop flying for 5 minutes)".

[30] Having received no reply from the plaintiff, Mr Duncan's evidence was that he prepared a draft document headed in large block capitals "STAFF EMPLOYMENT CONTRACT FORM" for the plaintiff on 27 December 2007. This showed the plaintiff as an employee rather than an independent contractor and contained standard provisions for annual leave, sick leave, and public holidays. Mr Duncan advised the plaintiff that he had done so by email on 28 January 2008 in the following terms:

> **Subject:** GCH employee proposal
>
> Gidday,
>
> I should have done this at the beginning of January, but got snowed under.

> I've prepared an "Employee" contract for you, John has had a run over it and is happy, so it's now just a matter for you, to take a look at it. It's all along the lines of the other guys.
>
> Do you want me to email it, or go through it with you.
>
> Whatever suits….

[31] Mr Duncan's evidence was because his email went unanswered he subsequently handed the plaintiff a copy of the draft staff employment contract form at a monthly meeting held to pay Carbine's invoice. His evidence was that the plaintiff fobbed him off and said "We'll just leave it for now".

[32] The plaintiff has denied ever receiving the draft employment agreement until it was produced for the purpose of disclosure in these proceedings in August 2010. At another point in his written brief of evidence, the plaintiff referred to Mr Duncan's emails of 10 July and 7 August 2007, but claimed that he had been unable to locate any subsequent emails concerning this.

[33] However, in an earlier paragraph in his written brief, the plaintiff acknowledged that he had received the 28 January 2008 email advising him that Mr Duncan had prepared an employee contract. He then claimed that although he would have much preferred to have a formal employment agreement with the defendant, its management were very unwilling to engage in a reasonable negotiation process.

[34] I found the plaintiff's evidence difficult to follow. The draft Staff Employment Contract Form appears to be very close to satisfying the plaintiff's demands and one would have expected the plaintiff to have requested a copy of it after receiving the 28 January 2008 email if he genuinely wished to change his status to that of an employee.

[35] The plaintiff's evidence goes on to state that some time after he had received Mr Duncan's email concerning the agreement he said he had prepared, the plaintiff agreed to meet with Mr Currie. This would have been in March or April 2008. Mr Currie agreed that this meeting took place at his house but he denied that Mr Brunton

attempted to negotiate on behalf of the pilots or that Mr Currie threatened to send the pilots down the road if they used NZALPA, as the plaintiff alleged in evidence.

[36] Substantial evidence was led and documents produced showing rosters and invoices. Mr Moran noted that the invoices were submitted on a monthly basis for approximately equal amounts and that Mr Duncan, when receiving these personally from the plaintiff, would almost inevitably write a cheque for the full invoice amount there and then. This evidence was addressed to the extent of the defendant's knowledge that the plaintiff had been claiming reimbursement for taking paid annual leave. I accept Mr Currie's evidence that he only became aware of this situation in mid-2007 and consequently directed Mr Duncan to address the situation. However, it appears Mr Duncan was aware from the rosters that the plaintiff was claiming annual leave from some time in 2004. Nevertheless, when that matter came to a head in mid-2007, Mr Duncan did take proper steps to address the matter in the emails he sent to the plaintiff and the draft employment agreement he produced which would have regularised the situation. The plaintiff relied on an email sent on 2 April 2008 from Mr Duncan acknowledging that annual leave was being taken "as has been the practice in the past". What the plaintiff does not acknowledge, however, are the consequences of not responding to Mr Duncan's requests to regularise the situation.

[37] There were negotiations between the plaintiff and Mr Duncan as to annual remuneration and Mr Duncan gave evidence that the plaintiff had once again, unilaterally increased the rate. In the 2 April 2008 email, Mr Duncan stated that he was angry about this unilateral step and that he had a good mind to stop the cheque. The email also states that he had got Mr Currie to agree to a PAYE contract with an increased remuneration to $96,000 per annum. The plaintiff responded saying that he understood they had agreed that the figure was $100,000 and his account was based on that agreement.

[38] That produced another response from Mr Duncan at 5.33pm that day stating:

> That's why we have "Contracts In Writing" so that this is crystal clear,…

> You cannot be "On contract" and take annual leave as well, as has been the practice in the past.
>
> Please decide whether you want to remain a "Contractor" or change to PAYE, effective 1/4/08, and we will document this accordingly.
>
> Going PAYE brings you into line with holidays (4 weeks per annum), + public holidays, etc.

[39] The plaintiff did not respond. The issue of leave was not resolved. On 16 September 2009, for reasons which are not relevant to this preliminary issue, the plaintiff received a letter, by way of an email, from Mr Currie in the following terms:

> **CONTRACT WITH GARDEN CITY HELICOPTERS LIMITED**
>
> I refer to the independent contractors contract for service dated 1 May 2003 between Garden City Helicopters Limited and Carbine Services Limited.
>
> I advise that the contract is terminated with effect from 5pm on 16 October 2009 ("the termination date").
>
> Please note that Carbine Services Limited is not required to provide any further services to Garden City Helicopters Limited during the period between the date of this letter and the termination date.

[40] The 2003 document allowed for either party to terminate the contract by advising the other party not less than four weeks prior to the intended termination date.

Discussion

[41] Mr Moran accepted there was no argument that the parties' relationship started life as a contract for services. The 2003 contract for service was headed "Independent Contractors Form" in large block letters. It is also conceded that five other pilots were engaged by the defendant in that early stage on an independent contractor basis. The plaintiff's claim is that the situation changed in late 1999 when the plaintiff resigned and was reengaged by Mr Currie on significantly revised terms and therefore little weight should be placed on the May 2003 contract document. The 2003 contract was alleged not to reflect the manner in which the relationship between the parties had been operating.

[42] I accept that there are occasions where a working relationship has changed during its course and an example is *A Mark Publishing New Zealand Ltd v Kendal*[5] where an employee was held to be an independent contractor but then reverted to employee status.

[43] The main difficulty with Mr Moran's submission is that I do not accept the plaintiff's evidence that the negotiations with Mr Currie took place as the plaintiff described. I accept Mr Currie's evidence that if the plaintiff had purported to resign in 1999, that resignation would have been accepted. It is also clear that the plaintiff was willing to set out his concerns in writing and, had he successfully negotiated such a change of terms with Mr Currie as he asserted, I find that he would have recorded that in writing. Agreement on the terms the plaintiff alleged is also completely incompatible with his signature on the 2003 document, which bears little relationship to the terms and conditions he says he negotiated with Mr Currie. In view of the plaintiff's experience in the industrial arena, his role in NZALPA, the availability of expert accounting advice, his long involvement in the aviation industry as an independent contractor through Carbine and his pivotal role as operations manager for the defendant, I do not accept that he would have signed the 2003 document unless he believed it represented his true employment status.

[44] The plaintiff's evidence was that his 1999 agreement with Mr Currie was to the effect that he was to be on the same employment terms as the new pilot. The new pilot was employed as an independent contractor. The plaintiff's evidence was also inconsistent with his own draft contract for service, dated 29 November 1999 which he states to be between the defendant and "Barry Brunton, Director, Carbine Services (The Contractor)". In cross-examination, the plaintiff rather reluctantly conceded that his draft was not an employment agreement but was a contract for services containing an allowance for paid annual leave. These are the reasons why I did not find the plaintiff's evidence, as to the reasons he signed the 2003 contract, convincing.

[45] Finally, I note that the plaintiff did not raise with the defendant his allegation of the 1999 change of terms in response to the issues raised by the defendant in 2007

[5] CEC 34/95, 14 August 1995.

about the plaintiff's leave taking. If the alleged terms had been agreed with Mr Currie in 1999 this would have provided the complete answer to the defendant's concerns. The plaintiff's failure to raise the 1999 agreement at the point when the issue was raised by the defendant leads me to doubt the plaintiff's credibility in raising it after the termination of the relationship. For all these reasons I prefer Mr Currie's evidence to that of the plaintiff where they were in conflict.

[46] Mr Moran conceded that the plaintiff had signed the 2003 contract documents. Mr Moran submitted that because seven years had elapsed from the previous document and there had been no formal renewal in that time, substantial changes were not being adequately documented. He also submitted that s 6 of the Act recognised the potential vulnerability and imbalances in bargaining power in the workplace and, although the plaintiff was a very experienced pilot and a capable and forthright person, Mr Moran submitted it did not necessarily follow that the plaintiff had equality with regard to negotiation of the terms of engagement.

[47] I am not persuaded by this argument for the reasons I have already given. There is clear evidence from the communications the plaintiff sent, that he was prepared to assert his rights and to forthrightly raise complaints, when it was in his interests to do so. He spoke of his resignation having the effect of grounding the air ambulance service. There was, I hold, near equality in bargaining power.

[48] Mr Moran submitted that the provision of paid leave for the plaintiff was incompatible with an independent contracting arrangement and the real nature of the relationship was one of a contract of service.

[49] Mr McPhail, for the defendant, submitted that, regardless of when the defendant first became aware that the plaintiff was being paid for annual leave, that this triggered the approaches, commencing in 2007 and continuing into 2008, by the defendant to alter the nature of the relationship from contractor to employee. These approaches were rebuffed by the plaintiff. Mr McPhail also submitted that annual leave was not an indicator of a contract of service in the present circumstances. He submitted that, on the evidence, the plaintiff was not paid annual leave in the manner applicable to employees of the defendant or in accordance with the relevant Holidays

Acts. Rather, the defendant paid Carbine the standard invoice monthly amount and in turn the plaintiff was paid his salary by Carbine which presumably included payment for his days off. He submitted that there was no evidence that the plaintiff received time and a half for working on public holidays or that he had ever applied for, or to the defendant's knowledge, taken sick leave.

[50] This, in Mr McPhail's submission, was atypical of an employment relationship. Instead it highlighted the "arms-length" manner in which the contracting relationship operated; that is, the plaintiff dealt with the defendant through his company, Carbine. Mr McPhail also submitted that the taking of annual leave was not necessarily indicative of a contract of service, citing *Cunningham v TNT Express Worldwide (New Zealand) Limited,*[6] where the contractor was entitled to 20 days time off for "sick leave, holidays or otherwise."

[51] As to the events of late 2007 and early 2008, I prefer the evidence of Messrs Duncan and Currie to that of the plaintiff. I find from the contemporary documents that the plaintiff was given several opportunities to become an employee of the defendant on terms which, as expressed in Mr Duncan's draft staff employment contract, were not unfavourable to the plaintiff, the consideration, for example, being expressed to be $95,000 per annum instead of the $100,000 the plaintiff was apparently claiming. I find it would have been open for the plaintiff, in the same way that he unilaterally increased the contract rates, to have negotiated with Messrs Currie and Duncan to have increased that remuneration if he had not found it adequate. His lack of response to the overtures made by Mr Duncan suggests that at this point in time the plaintiff was an independent contractor and content to continue to have his services compensated for by invoices rendered through Carbine.

[52] Further, the plaintiff's written communications to Messrs Currie and Duncan show no inhibitions in the plaintiff pursuing matters to further his own interests, in very plain English. I do not accept that with the plaintiff's background in industrial relations and his role in NZALPA, that he would have been prevented from seeking to change his employment status, as suggested by Mr Duncan, had the plaintiff considered it in his best interests to do so. I note in 2008 that the plaintiff and his

[6] [1993] 1 ERNZ 695 at 706 (CA).

wife were still deriving their income from Carbine by way of income splitting and the source of the company's income in Carbine's documents was expressed to be from "Air Ambulance Contracting Fees".

[53] Carbine also claimed expenses including car expenses, the running of a home office and depreciation on various items. The plaintiff acknowledged this in his evidence, stating that by this means he was "able to optimise my net income earned through Garden City Helicopters."

[54] I therefore accept Mr McPhail's submission that "annual leave" was not an indicator of a contract of service in the circumstances of the present case.

[55] Mr Moran in his submissions examined the evidence under the headings of the tests applied by the Supreme Court in *Bryson* in order to derive the intention of the parties.

The economic reality test

[56] This is also known as the fundamental test as to whether the person who engaged in providing the services, did so as a person in business on his or her own account. Mr Moran submitted that Carbine, which had predated the parties' relationship, was a convenient vehicle for the initial contract arrangements and, despite the plaintiff's misgivings about the true nature of the relationship, simply continued to be used. He submitted that the Supreme Court still found that Mr Bryson was an employee, even though he was paid by invoices and categorised as self-employed for taxation purposes. He cited *Raine Blackadder Ltd, (t/a Ray White Commercial) v Noonan*[7] where a person registered for GST paid her own ACC levies and was paid on the basis of GST invoices. Nevertheless she was held not to be in business on her own account because she worked solely for the plaintiff using the plaintiff's equipment and lacked any real scope for increasing her income.[8]

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[7] [2006] ERNZ 122.
[8] At [101].

[57] Mr McPhail cited *Downey v New Zealand Greyhound Racing Association Inc*[9] where it was held that the plaintiff had experience as a self-employed person in business on his own account, knew the full nature of his engagement and had submitted GST invoices for his services in the name of a business entity, rather than in person and had obtained taxation advantages.[10] The plaintiff in that case was found to be a contractor.

[58] Mr McPhail submitted that in the present case the plaintiff was in business on his own account because of the following facts:

- The plaintiff conducted his own business running not one but two companies during his engagement with the defendant.

- In this sense the plaintiff was commercially aware of the advantages of company ownership and of trading as a contractor rather than an employee.

- Carbine's monthly invoices used the word "contract" for the month concerned and varied with the amount of work that the plaintiff assigned himself, thereby making Carbine responsible to an extent for its own profit and loss.

- Carbine paid salaries to the plaintiff and his wife who split the income to gain maximum tax advantages.

- Carbine described its income as "Air Ambulance Contracting fees".

- Carbine claimed expenses including motor vehicle expenses and others associated with the running of the home office.

- Carbine claimed depreciation on various home office items.

[9] (2006) 3 NZELR 501.
[10] At [36].

- The plaintiff gave evidence that he had set up the home office to "optimise my net income earned through Garden City Helicopters Ltd."

- The plaintiff's income tax returns showed him as having received "shareholder employee salaries."

- The plaintiff also received shareholder salary payments from another company, BBJ Industrial Limited."

[59] Mr McPhail submitted that Carbine was not contractually restricted by the defendant in its ability to carry out other work and pointed to the evidence that the plaintiff frequently flew other aircraft, sometimes in the defendant's time and invoiced for the work carried out for other operators, including Southern DC3 Ltd and "Warbirds over Wanaka". He submitted that the plaintiff and his wife had the opportunity to charge through Carbine for a variety of services performed for other persons, noting the original work that the plaintiff performed for Scenic Circle Hotels.

[60] Mr McPhail submitted noted that the defendant:

- Included Carbine in its Goods and Services Tax Returns.

- Did not deduct PAYE for the plaintiff.

- Did not require the plaintiff to sign an IR330 employee tax declaration.

- Did not include the plaintiff in its schedule for annual leave calculations.

- Did not require the plaintiff to submit leave forms.

- Did not pay holiday pay to the plaintiff directly but by default by paying Carbine for the time that the plaintiff took off.

[61] Mr McPhail submitted that the extent and complexity of the plaintiff's commercial and taxation arrangements were such that they far exceeded any mere consequence of the labelling of a person as a contractor. Carbine, he argued, was a real company employing both Mr Brunton and his wife and which traded in a way to obtain maximum tax advantages for its owners, including income splitting and the claiming of depreciation.

[62] Mr McPhail also referred to those cases where a limited liability company was included in the contracting relationship and it was held that the status was that of a contractor.[11] He concluded by submitting that in all these circumstances the economic reality test was overwhelmingly in favour of a finding that the plaintiff was not an employee of the defendant.

[63] I accept Mr McPhail's submissions. This is not a case, like *Bryson*, in which an employee was required to contract on the basis of an independent contractor in order to obtain any work and there was clearly unequal bargaining power. The plaintiff had incorporated Carbine on 18 January 1994 and had used it throughout his business activities for both the defendant and for other sources of income.

[64] Carbine is recognised in both the draft document the plaintiff himself prepared, and in the 2003 Independent Contractors Form, which he signed. I noted that in neither of these documents was the word "Limited" or its abbreviation "Ltd" used. Mr McPhail referred to this as a simple linguistic mistake and that the true intention of the parties was that the contract was between Carbine as a limited liability company and the defendant. Mr McPhail relied on *Vector Gas Ltd v Bay of Plenty Energy Ltd*[12] where the Supreme Court held that a clear drafting or linguistic error, combined with equal clarity as to what was intended, could be remedied by way of interpretation.

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[11] These included *Ferens v French (Asia Pacific) Ltd* [1998] 1 ERNZ 303; *McGreal v Television New Zealand Ltd* (2007) 4 NZELR 345; *Davis v Canwest Radioworks Ltd* (2007) 4 NZELR 355; *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114.
[12] [2010] NZSC 5, [2010] 2 NZLR 444 at [33] per Tipping J.

[65] Mr McPhail also observed that the plaintiff had conceded in evidence that he had used "shorthand" to describe his company as either Carbine Services or Carbine Services Ltd. The invoices produced by the plaintiff to the defendant varied in description from Carbine Services to Carbine Services Ltd.

[66] The plaintiff also acknowledged that Carbine was a limited liability company and an independent contractor and that the letter of termination was also addressed to the company. For all purposes, the parties and their legal advisors considered that Carbine Services Ltd was the contracting party. This meant, from the way the parties had constructed their documents, that the plaintiff, if employed by anyone, was employed by Carbine and not the defendant.

[67] I accept Mr McPhail's submissions and find that the economic reality test strongly favours a finding that the plaintiff was not an employee of the defendant but an employee of Carbine, and was an independent contractor engaged by the defendant.

The control test

[68] Mr Moran submitted that control was a relevant factor and the defendant had the right to control the plaintiff, not only as to what he had to do, but also how and when he was required to do it. Mr Moran made light of evidence led on behalf of the defendant that it had difficulties in exercising control over the plaintiff, partly as a result of his contractor status. The plaintiff's position was that the defendant did have the right of control over him, whether or not it chose to exercise it.

[69] Mr Moran accepted that the plaintiff set the rosters but this was an operational task and, in any event, the plaintiff was at all times required to follow directions. He submitted that an unusual feature of the case was the overlay of the Civil Aviation Authority's requirements and the structure provided under the defendant's operations manual. This showed that the plaintiff was required to report to Mr Currie, although it appears to be accepted that they had little contact in reality. Mr Moran accepted that Mr Duncan was not lawfully entitled to dictate to the plaintiff operational matters and that Mr Brunton was accountable, through Mr

Currie, to the Civil Aviation Authority for any problems or accidents occurring. He submitted it would have been no excuse for the plaintiff to have said that he was simply following instructions. He submitted that although the plaintiff exhibited a degree of autonomy, this was not due to his alleged contractor status, but because of the authority and obligations provided under the operations manual.

[70] Mr McPhail submitted that the statutory responsibilities through the civil aviation legislation should not be confused with control by the defendant, citing the *Downey* case. He submitted that it was not unusual for there to be specifications or requirements upon a contractor, citing the *Cunningham* decision. He submitted there was no day to day detailed supervision of the plaintiff of the nature found in some cases. He pointed to the evidence that the plaintiff had accepted that a degree of control was required of either an employee or a contractor and that this had not been an issue previously during the relationship. He submitted that the plaintiff had considerable autonomy and that even if there was a significant degree of control, which he denied existed, it was not a conclusive test, citing the *Davis* case. He also relied on *Koia v Carlyon Holdings Ltd*[13] where the full Court observed that while the purported employer exercised close control over financial aspects of the relationship, it did not exceed the degree of control and supervision necessary for the efficient and profitable conduct of a business being run by an independent contractor.[14]

[71] I accept Mr McPhail's submission that the control test does not assist in establishing that the plaintiff was an employee. This was one example of a case where the same statutory measure of control would have been exercisable over the operations manager whether or not that person was an independent contractor or an employee. Like the situation in *Chief of Defence Force v Ross-Taylor*[15] the professional work involved could have been performed by an independent contractor, or by an employee.

[13] [2001] ERNZ 585.
[14] At [35].
[15] [2010] ERNZ 61.

Integration Test

[72] The same comments apply to the integration test. The work carried out by the plaintiff over nearly 10 years of service could have been performed equally well by a contractor or an employee. I accept that the plaintiff made a substantial contribution to the development and the operation of the defendant's fixed-wing ambulance service including work on the preparation of uniforms and developing manuals but hold that that was simply part of the work that he performed and did not bear on his status.

[73] Mr Moran then dealt with a number of factors under the following headings.

Delegation of work

[74] Mr Moran submitted that during the nine years the plaintiff personally undertook the performance of all his duties, there was little room for him to delegate to anyone else. However, the plaintiff's work could equally have been performed by a contractor or an employee and he did have the power to delegate if he had chosen to use it.

Engagement in other work

[75] Although the plaintiff initially worked for other entities, Mr Moran submitted that towards the end of the plaintiff's career it was simply not possible for him to undertake any other work because he was required to be on call 24 hours a day for the defendant. He also referred to the limitations under the civil aviation requirements and the operations manual. He submitted that the alleged flexibility in the plaintiff's role was therefore only hypothetical.

[76] However, I note that both the plaintiff and his wife invoiced their work through Carbine. In spite of the plaintiff's professional burdens in supplying services for the defendant, he was able to perform other paid work to a limited extent. I find these were practical rather than legal considerations and do not affect his status.

Other matters

[77] Mr Moran submitted that it was convenient for the plaintiff to work from home and he did not have an office in the defendant's premises. He lived only five minutes' drive from the airport and therefore was ideally placed to respond quickly to emergency callouts. Mr Moran submitted that the plaintiff's ability to work from home was consistent with the nature of his activities and responsibilities and the extent to which he had to provide equipment was also very limited.

[78] The difficulty with Mr Moran's submissions is that for tax purposes the plaintiff did claim deductible expenses in respect of his home office and equipment through Carbine. I find the location of the plaintiff's office does not assist in determining the real nature of the relationship.

Deliberate decision to remain as "contractor"?

[79] Under this heading Mr Moran acknowledged that warnings have been sounded by the courts of those persons seeking to introduce tax advantages into their contractual arrangements, that they may have to abide by the consequences of classifying themselves as being self-employed. Examples are to be found in *Telecom South v Post Office Union* .[16] Mr Moran submitted that in the present case the plaintiff considered that the relationship had changed to one of employee status, notwithstanding the taxation and invoicing arrangement.

[80] The difficulty with this submission, as Mr McPhail observed, is that at no stage during the relationship did the plaintiff express, either orally or in writing, a request that his true status as an employee be recognised by the defendant. To the contrary, when the defendant invited him on several occasions to reconsider his status, he did not respond. He had prepared a draft contractual document which was consistent only with contractor status and had signed the 2003 document on what was described as the "Independent Contractors Form". As late as 2008, the plaintiff had the opportunity to respond to the defendant's invitation to change his status but

[16] [1992] 1 ERNZ 711 at 725 (CA).

took no steps. Instead he continued to invoice the defendant through Carbine and to claim the taxation benefits.

Conclusion

[81] Having considered all of the matters put before me, including the matters that indicate the intention of the parties, I conclude that the real nature of the relationship between them was governed by a contract for services and that the plaintiff was employed, through Carbine, as an independent contractor.

[82] In reaching this conclusion I have taken into account my acceptance of Mr McPhail's submissions for the reasons I have given.

[83] This is a case where the parties appeared to have been content with their contractual relationships over a lengthy period. These arrangements were freely and independently entered into and the plaintiff was a professional with extensive experience in employment matters and the recipient of good accounting advice. He did not take up the opportunities he was repeatedly offered to contract as an employee. To the contrary, it was not until after the termination of the 2003 contract that the plaintiff first raised his claim that the real nature of his relationship was that of a contract of service.

[84] As I have previously expressed,[17] it is a very serious matter for either the Employment Relations Authority or this Court to find, not withstanding the clear intention of capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually agreed, after those arrangements have terminated, that the real nature of their relationship was completely different.

[85] For all these reasons, I conclude that this Court has no jurisdiction to deal with the plaintiff's claims and they must be dismissed.

[86] Costs are reserved and may, if they cannot be agreed, be the subject of an exchange of memoranda. Because of the difficulties that Christchurch practitioners

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[17] *Ross-Taylor* at [30].

have experienced since the recent dreadful earthquakes, I put no time limit on the filing of those submissions although I would hope to receive something within the next three months. If nothing has been filed, the position can then be reviewed.

B S Travis
Judge

Judgment signed at 4.30pm on 31 March 2011