

[4] Despite Mr Catley's claim to the Authority that he considered himself to be an employee, the evidence discloses that he made no such claim to Altair during the engagement and indeed, looked at uncritically, the arrangement would appear to be a straightforward contractor/principal arrangement which both parties sought and which operated in the way such arrangements commonly do.

Issues

[5] The only issue for determination in the present case is whether Mr Catley was an employee or not. It will be useful if the Authority considers the course of the relationship, and then reviews the law.

What was the course of the relationship?

[6] The Authority is satisfied on the evidence it heard that Mr Catley was not an employee. The parties entered into discussions for the recruitment by Altair of an employment position styled Business Development Manager. However, the Authority is satisfied that during those negotiations Mr Catley proposed that the arrangement be not one of employment. This was in an email sent by Mr Catley on 15 February 2011 in which he made it clear it was advantageous to him to work as a contractor because he had set up his previous company and orchard "*as a tax loss situation*". Attached to that email was a draft independent contractor agreement which Mr Catley suggested to Altair as a basis for the engagement. Contemporaneously, Altair had sent to Mr Catley an offer of employment incorporating a draft standard form employment agreement. For the avoidance of doubt, it is useful to record now in its totality the text of the email sent by Altair to Mr Catley on 15 February 2011 at 2.32pm:

Hi Warren,

Thanks for sending me your draft agreement. As I said this morning I thought we were discussing a full time position rather than a contract role.

With that in mind please find attached our standard employment contract which includes a draft offer for your perusal and comment. I am happy to discuss a contract role as well should that be of more interest. Please give me a call to set up a time to meet and discuss it.

[7] It is plain then that Altair advertised an employment position, solicited, amongst other inquiries, one from Mr Catley, offered the position to Mr Catley as an

employee, but in the course of doing so indicated a willingness to contemplate a contractor role. Mr Catley had suggested that he would prefer a role as a contractor and went so far as to send his standard form contractor agreement to Altair for its perusal.

[8] Subsequently, Altair sent its own standard form contractor agreement to Mr Catley stamped “draft” and it was the latter agreement which formed the basis of the contract for the provision of contract services (the agreement) which the parties subsequently executed so as to enable work to start on 3 March 2011.

[9] It is self-evident from the foregoing that the initiative for the contractor relationship came not from Altair but from Mr Catley. But his contention in affidavits filed in support of his application that Altair did not want a contractor relationship is both wrong and was conceded by him in his oral evidence. It is perfectly plain that Altair was very happy to consider a contractor relationship, made that clear, and subsequently willingly entered into the arrangement as proposed by Mr Catley.

[10] Having executed the agreement, the parties then settled down to their relationship and the practical consequence was that each month Mr Catley invoiced Altair on behalf of his own company, Catley Enterprises Limited, of which he was the sole director.

[11] It is common ground that Mr Catley was a specialist salesperson in the IT industry although despite that, Altair was not satisfied with Mr Catley’s performance. Where substandard work was performed, the evidence before the Authority disclosed that Mr Catley (or more accurately his company) bore the costs of attending to that.

[12] Similarly, there was no provision for the payment of holidays and where Mr Catley chose not to provide services, he was under no obligation to (and did not) obtain the consent of Altair. The Authority is satisfied that there are a number of examples of this custom and practice in the evidence, demonstrated particularly by variations to Mr Catley’s invoices to Altair.

[13] Mr Catley maintained that he was required to attend at the office of Altair in order to get paid. That contention is denied by Altair and, for the record, not accepted by the Authority either. The evidence is plain that, at the beginning of the relationship, Mr Catley sent an email to Mr Guy of Altair dated 17 February 2011 in which he set out the way that he liked to work. In essence, the email confirms his

intention not to attend at the office whenever working and the Authority is satisfied on the evidence it heard that that email set out the pattern of the relationship between the parties and was not contradicted by Altair despite Mr Catley's claims in that regard.

[14] In relation to Mr Catley's particular claim that unless he attended at the office he would not be paid, that contention was specifically denied by Altair's witnesses and on the evidence the Authority heard, their view is to be preferred. It is apparent that Mr Catley's invoices were paid and yet Altair's evidence is that Mr Catley was frequently not in the office. Its position, understandably, was that there was no requirement that he attend at the office, only that he do the contract role required of him from wherever he chose to work.

[15] There was some argument between the parties about the payment for statutory holidays. On occasion Mr Catley had contended that he had worked statutory holidays and was therefore entitled to payment. Towards the end of the relationship, as things became more tense, Altair took exception to some of Mr Catley's claimed hours, including in relation to claimed work on statutory holidays.

[16] Altair's principal witness, Mr Guy, the director of Altair, suffered serious ill health in the early part of calendar 2011 and was not back in the office full time until the third quarter of that year. Once Mr Guy returned to the office full time, he began to be anxious about the quality of Mr Catley's production and insisted on more visibility from Mr Catley in consequence. Indeed, the Authority was told that during the course of Mr Catley's engagement, and despite his role as a salesman, he had not succeeded in closing one deal which encouraged Mr Guy to be more watchful about Mr Catley's activities.

[17] The equipment used by Mr Catley was provided by Altair. The Authority was told that that was standard practice in the IT industry and on the face of it, given the need to provide both confidential information belonging to the employer and protect its intellectual property, it seems logical that the principal would provide the gear to enable the contractor to perform the role. These arrangements, along with the other arrangements made in respect of Mr Catley, were exactly the same as for other contractors engaged by Altair. The same approach applied in respect of email addresses and the like.

[18] There was an ability for Mr Catley to work for other entities and it is plain on the evidence that he did so. The very purpose that Mr Catley suggested for the independent contractor arrangement was to facilitate, in part, his orchard business. The Authority was satisfied on the evidence it heard that Altair put no impediment in the way of Mr Catley working for others. Mr Catley maintained in his evidence that he was required to effectively work a 40 hour week for Altair, but the Authority does not accept that the evidence discloses that at all. What the Authority considers that the evidence discloses is that Altair was anxious about Mr Catley's accounting for his time and was taking steps to address that with him during the latter part of the engagement. That makes sound commercial sense but does not, of itself, prove that Altair was demanding he work 40 hours a week, thus precluding him from working for others. All Altair wanted was that, when he worked for it, he provided value for money.

[19] On 10 November 2011, Mr Catley gave notice of the termination of the contract, as he was entitled to do. The effect of that termination was to bring the arrangement to an end on and from 10 January 2012. Mr Catley did not, at that time or at any other time during the engagement, indicate to Altair that he was an employee.

The law

[20] The law on this issue is well known. In *Bryson v. Three Foot Six Ltd* [2003] ERNZ 581, Judge Shaw in the Employment Court enunciated the test which was subsequently approved by the Supreme Court. Her Honour said that the Court's task was to identify "*the real nature of the relationship*" and that was done principally by looking at the common law tests that have traditionally been applied to determining the status of an individual.

[21] Subsequent to *Bryson*, the Employment Court has decided the case of *The Chief of Defence Force v. Fiona Ross-Taylor* [2010] NZEmpC 22. In that decision, the Employment Court cites with approval a passage from *Massey v. Crown Life Insurance* [1978] 2 All ER 576, 581 as follows:

In the administration of justice the union of fairness, commonsense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to gain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my

judgment the union between fairness, commonsense and the law is strained almost to breaking point.

[22] Altair says that precisely the situation envisaged by the English decision in *Massey*, is in play here. It alludes to the fact that the nature of the relationship at commencement was driven by Mr Catley's wish, that at no stage during the relationship did Mr Catley indicate his belief that he was an employee and yet, when the relationship went sour (because according to Altair Mr Catley failed to perform), he developed a belief that he was an employee in order that he could claim compensation which would not otherwise be available to him.

[23] In both *Bryson* and *Ross-Taylor*, the Court has emphasised the importance of assessing all the relevant issues. While it is plain that the intention of the parties is no longer decisive, it is still relevant and as counsel for Altair correctly points out in his submissions, the present case can be distinguished from *Bryson* for instance because in the present case, the parties were at one on their intentions. Mr Catley proposed a contractual relationship and, notwithstanding that that was not the basis on which it had started its recruitment process, Altair promptly agreed and throughout the relationship, there was never any change in either party's intention, or at least there is no evidence that the Authority can discern, that either party changed its position in relation to the relationship between them.

[24] Furthermore, in reliance on *Ross-Taylor*, the Authority must be very cautious about disturbing a relationship where, on the evidence, each party intended that the relationship be an independent contract. This is especially the case where both parties are experienced commercial people, both have access to legal advice should they need it, and there was no obvious power imbalance between the parties. Even if there were a power imbalance, it was Mr Catley who suggested the independent contractor relationship and not the other way round. Mr Catley had previous experience of working in that sort of environment and, very much on all fours with *Ross-Taylor*, Mr Catley proposed that relationship ostensibly because he wished to take the tax benefit that working as an independent contractor would give him.

[25] For the avoidance of doubt, the Authority now considers the various tests that have been enunciated by the common law for determining the status of these kinds of relationships. The first test is the control test which requires an assessment of the amount of control that the principal has over the other party. Mr Catley maintained

that he was told what to do by Altair and told when to do it. He says that he was made to take a colleague to sales meetings with potential clients and required to work in the office. That evidence is contested by Altair and the Authority prefers Altair's evidence. Altair says simply that Mr Catley had complete freedom of action but that once it became anxious about his utility as a contractor, it became more concerned to monitor his work performance. That seems an entirely sensible commercial decision to the Authority and not one that should necessarily encourage the Authority to conclude that an employment arrangement was in place.

[26] Nor is the Authority attracted by Mr Catley's curious argument for a "hybrid" position, namely that Mr Catley would invoice as a contractor but be an employee. This argument was advanced on behalf of Mr Catley but his own evidence to the Authority negated that submission completely. There simply was no evidence that the parties entered into some sort of sham contractor arrangement but actually intended that there be a relationship of employment. All the evidence suggested to the Authority that there was a wholehearted adoption of the contractor principle and that both parties engaged on that footing.

[27] It follows from the foregoing that the Authority is not persuaded that Altair set Mr Catley's hours of work, required his attendance when he was working or in any other reasonable respect placed itself in a position where the line was crossed from a contractor position to an employment position. As the Authority has already made clear, it thinks it perfectly proper from a commercial perspective for a principal to seek to extract value for money from a contractor, but the fact that the principal takes steps in that regard does not of itself justify the conclusion that the parties are actually engaged in an employment relationship. Even in a contract for services, the party paying must have rights to ensure that they are getting value for money from the contractor.

[28] The integration test seeks to assess how far the individual has integrated into the affairs of the principal. In the present case, Mr Catley's work was analogous to work performed by a number of other individuals who were employees but, unlike them, Mr Catley did not file timesheets, was not required to account in a detailed way for his time (although Altair came to regret that decision during the course of its relationship with Mr Catley) and, consistent with his email to Altair of 17 February 2011, could "*spend very little time in the office*".

[29] It is true that Mr Catley had an email address which integrated him into the Altair business, but given the nature of his role, that is not surprising. Furthermore, as the Authority has already noted, by virtue of the particular demands of the IT industry, it would be quite difficult to operate on any other basis. Similarly, the provision of equipment to Mr Catley reflected the particular nature of the industry rather than evidence of integration with the business of the employer. And of course, not all of the equipment was provided by Altair. Mr Catley used his own vehicle to make calls on clients but the failure to provide a vehicle is not actually evidence for a lack of integration, but rather a function of the lack of uniqueness to the industry of vehicular transport. Nothing turned for the business on what sort of vehicle Mr Catley drove. The position was otherwise in respect of computer hardware and software where it would be difficult if not impossible for a contractor to operate in the rarefied environment of the IT industry without using the principal's gear.

[30] The fundamental test seeks to identify whether the person performing the services is doing so on his own account or not. In the present case, it seems to the Authority plain that Mr Catley was providing the services on his own account. He apparently had had a reasonably extensive experience as a contractor in his own right and by the time he contracted with Altair, he had taken the decision to incorporate a company to further formalise the arrangement. He made it clear to Altair at the commencement of the relationship, when it offered him an employment agreement, that he preferred a contractual arrangement. He also told Altair why when he referred to "*my previous company and orchard as a tax loss situation*" when indicating to Altair that it was advantageous to him to be a contractor.

[31] During the relationship, monthly invoices were rendered and paid. There is nothing to suggest a half-hearted or "hybrid" arrangement here. Mr Catley proposed the arrangement, acted in accordance with it throughout the engagement, chose to bring the relationship to an end by giving the appropriate period of notice and at no stage during the whole engagement did he once claim that the relationship was one of employment. It was only after the relationship came to an end, and apparently in the context of an understandable concern about the failure of Altair to pay two months invoices (about which there is a dispute), that Mr Catley appears to have concluded that he was in fact employed by rather than contracted to Altair.

[32] The Authority is satisfied then that Mr Catley was a self-employed contractor rendering invoices to his principal on a GST basis through his own company of which he was the sole director, obtaining payment against those invoices and proceeding from the start to the finish of the relationship without once raising any suggestion that the relationship was something other than the relationship that he himself had suggested and that both parties had willingly embraced.

[33] None of the common law tests give any credence to the view that Mr Catley was an employee. Indeed, properly construed, each supports the conclusion that Mr Catley was a contractor. Moreover when those tests are taken together, the aggregated effect of them is to further reinforce the position.

Determination

[34] The Authority is satisfied that Mr Catley was at all times not an employee of Altair and accordingly that there was never an employment relationship between the parties. It follows that any residual dispute between the parties in relation to outstanding payments must be resolved in another forum.

Costs

[35] Costs are reserved.

James Crichton
Member of the Employment Relations Authority