

[3] There are few relevant factual disputes. I will set out the background, resolve those disputes and apply the relevant legal principles to those facts.

[4] The proceedings were initiated against Mr Booth only. However, it was agreed during the investigation meeting that if the Authority finds that there was a legal relationship between the applicants and the company the company should then be formally joined as a party to these proceedings for the purposes of any determination.

Sale and purchase of the Otematata Hotel

[5] Mr Booth's company is in the business of buying and selling contracts relating to land and buildings. In this case the company contracted to buy the freehold of the Otematata Hotel intending to lease out the bars, restaurant and accommodation and then assign the purchase contract to another purchaser, although it was open to other possibilities. The Hotel includes some accommodation as part of the bars and restaurant complex and further stand alone accommodation facilities. The vendors agreed to allow the company access to the stand alone accommodation facilities prior to settlement. The sale and purchase contract dated 14 October 2008 had a due diligence special condition so that if the company was not satisfied as to the economic viability of its plans it did not need to confirm the contract. The settlement and possession date was 2 February 2009 but that was later extended.

[6] Ms Cousins and Ms Harris owned and operated the Lauder Hotel. They knew Maitland Booth's father, Clive, who introduced them to his son during the time they were at the Lauder Hotel. It is common ground that Mr Booth spoke to Ms Cousins and Ms Harris at a chance meeting sometime in October 2008 in connection with his plans for the Otematata Hotel. Mr Booth's evidence is that he would have referred to a company buying and having plans for the Hotel (without necessarily naming his company) rather than him personally. I do not accept that evidence. It is given now simply to distance himself personally from potential liability. It is more probable that he referred to his plans at the time as he had no reason to be legally precise. Indeed it was always likely that the company would assign the sale and purchase to a nominee rather than settle the purchase itself. Ms Cousins, Ms Harris and Mr Booth agreed to keep in touch.

[7] Later, Mr Booth contacted Ms Cousins and arranged to meet them both at the Otematata Hotel. He showed them through the stand alone accommodation. Next, the three met over lunch at Alexander in late November 2008. There are no other witnesses to this conversation. Mr Booth told me that he did not make any notes in preparation for, during or after this meeting. Neither did Ms Cousins or Ms Harris. There is a stark difference between the evidence of Ms Cousins and Ms Harris on the one hand and Mr Booth on the other about this discussion. The two women say that there was no discussion about them leasing the stand alone accommodation for them to operate their own business and that the discussion was about them managing the accommodation for an agreed hourly rate and some travel money while lease arrangements were established with others. Mr Booth on the other hand says that there was no discussion about employment and only a discussion about them conducting due diligence running the accommodation prior to them entering into a formal lease. I will return to this conflict later. Again, and for the same reason as before, I find that Mr Booth described the plans as his plans rather than those of a company.

At the Otematata Hotel

[8] In early December 2008 Ms Cousins and Ms Harris commenced setting up and running the stand alone accommodation as a business separate from the rest of the Hotel. The existing leasees continued to operate the rest of the Hotel. Mr Booth's evidence, which I accept, is that the company under its access arrangements with the vendors had to spend some of the takings on various improvements to the Hotel. Otherwise the company benefitted from the takings after Ms Cousins and Ms Harris paid expenses from the cash takings. Some time after they commenced their role at the Hotel Ms Cousins and Mr Harris came to learn that the company called North Dunedin Holdings Limited was operating the stand alone accommodation business rather than Mr Booth personally. Cheques and residual cash were banked into the company bank account by Ms Harris usually in Alexander and eftpos receipts were credited to the company electronically.

[9] There is a submission for the respondent about the real nature of the relationship being something other than employment under a contract of service. I am referred to the control, integration and fundamental tests and the point is made that industry practice can help in establishing parties' common intentions.

[10] As owners and operators of the Lauder Hotel for five years the applicants can be taken as being familiar with the industry practice of leaseholders operating businesses in taverns and hotels even though their business was not subject to any leases. They also knew (as did Mr Booth) that there are always formal legal documents required in such circumstances from the outset. Here, there were none. All of them also knew that hotel and tavern businesses are sometimes operated directly by the owner of the freehold (as was the case with the Lauder Hotel) and sometimes by a leasee. There is no uniform industry practice.

[11] The submission includes the contention that the applicants understood the significance of a due diligence period. The evidence is that Mr Cousins and Ms Harris were not shown the sale and purchase agreement or given a copy of it. They were told that the transaction had not settled at that point and that Mr Booth had access in the meantime as mentioned above. The due diligence special condition in the sale and purchase agreement was for the benefit of the purchaser, not for strangers to that contract such as the applicants. However, I accept that Mr Booth may well have told Ms Cousins and Ms Harris that there was a due diligence condition in the contract which needed to be satisfied before he was bound to settle the purchase. However, that is very different from Ms Cousins and Ms Harris agreeing with Mr Booth (or his company) that they would have a due diligence period before entering into a contract or lease with him or his company.

[12] It is not necessary to consider in any great detail the legal tests for establishing whether a contract is a contract of service. In the present case, the stand alone accommodation business was the company's. Mr Booth could not manage it day to day because he lived elsewhere and had other business interests to attend to. Ms Cousins and Ms Harris mostly lived in and they worked day to day managing and operating the company's business rather than operating that business on their own account. If there was a legal relationship established it was certainly a contract of service rather than anything else.

[13] Whatever the character of the relationship, it ended on 15 March 2009.

[14] Mr Booth's evidence is that towards the end of the due diligence period he got a draft agreement to lease prepared but, before he could give it to them, the applicants told him that they would not take on a lease. Mr Booth also says that in March, following the end of the due diligence period, the applicants decided they wanted

something for their time. Although it had not been contemplated previously, he understood their point about travel costs and gave them \$400.00 by way of reimbursement and later deposited \$500.00 into their account to refund them for the float they had put in at the start.

[15] Ms Cousins' evidence is that she received numerous assurances in January and February that she would be paid. By the beginning of March, when nothing had materialised, she insisted she be paid or she would leave. In response Mr Booth gave them \$400.00 cash on 6 March as a contribution towards their petrol costs. He then deposited \$500.00 into Ms Harris' bank account on 12 March. The payments apparently came from company funds but there was nothing to indicate that to Ms Cousins and Ms Harris. That was not enough so Ms Cousins and Ms Harris left on Sunday 15 March. They worked over the weekend because they felt they should honour those bookings. This is also the evidence of Ms Harris.

[16] Ms Cousins and Ms Harris actually used \$200.00 of their own money as a float at the outset. When I asked Mr Booth why he refunded \$500.00 for a \$200.00 float he said that they had incurred other costs such as lightbulbs. That evidence is unconvincing as an explanation for paying the larger amount. It is also clear, contrary to Mr Booth's evidence, that Ms Cousins and Ms Harris demanded payment before the end of their time at the Otematata Hotel. I prefer the evidence of Ms Cousins and Ms Harris about the events surrounding their departure from the Otematata Hotel.

Legal relationship?

[17] The starting point is to determine whether there was any contract as a result of the discussions between the two women and Mr Booth in late November 2008 over lunch at Alexander. All the elements of agreement must be present: offer, acceptance and an intention to create a legal relationship.

[18] The principle argument for Mr Booth is concisely summarised in the statement in reply. It reads:

I approached the Applicant and Karen Harris in approximately October 2008 and asked them if they were interested in taking on the lease. They said they were. We therefore arranged that they would have a due diligence period of three months, during which time they would have free run of the premises and come and go as they liked, but would continue to operate the accommodation side of the Hotel business (they had no interest in operating the bar as well).

[19] Ms Cousins and Ms Harris said in evidence that they were never interested in any lease arrangement. They had had many years working, then five years operating the Lauder Hotel which they sold in April 2008. They initially intended to take a break for a year. When approached they became interested in the idea of three months work but told Mr Booth they were not interested in any lease arrangement. When questioned about the November discussion, Mr Booth told me *I think they made mention that they weren't interested in a lease*. That reflects the evidence from Ms Cousins and Ms Harris which I accept. In light of that finding it is improbable that there was any agreement about due diligence for three months in advance of entering into a lease arrangement.

[20] Mr Booth always intended to lease and/or on sell. As he explained in evidence purchasers usually need finance but lenders usually require secure long term leases before they will lend. The existing leasees were not going to continue. Mr Booth wanted to lease the whole complex to one or more leasees and sell or assign the freehold. He was engaged in negotiations with at least one other party from January 2009 or earlier and had a valuation report from about 11 February 2009. Having Ms Cousins and Ms Harris there as experienced hoteliers getting that part of the business going gave him some cashflow and kept his options option. I do not accept that Ms Cousins and Ms Harris were there working in the business as a result of any agreement between them and Mr Booth for them to tack or consider taking a lease.

[21] Little formality is required for the formation of an employment agreement. Often all that is agreed is a commencement date, a rate of pay and an understanding about the work to be done. Given my preference for the evidence of Ms Cousins and Ms Booth there is sufficient to establish that an employment agreement was formed in respect of both women. That is my finding.

[22] As to the issue of the employer's identity I am referred to *Colosimo v Parker* (2007) 8 NZELC 98,622. In that case the Employment Court discussed the principles applicable to indentifying the correct respondent. The burden is on the applicant, the focus on the start of the relationship subject to proof of any later agreed change and the standard is an objective assessment of the evidence. In *Colosimo* the Court held that the real issue there was whether Mr Colosimo ever held himself out to be the employer. During a chance meeting he told an acquaintance who was asking about employment for her son to send the son to a business which he may have referred to

as his new venture. The son went to the business, had a brief trial and was then employed. The Court specifically found that the brief discussion between Mr Colosimo and the mother did not amount to a contract. Here, my finding is that the discussion between Mr Booth, Ms Cousins and Ms Harris did create a contract of employment.

[23] I further find that the employment contract was between Mr Booth and Ms Cousins and Ms Harris. Mr Booth never identified any other party on whose behalf he might have been entering into the agreement. Later the applicants came to learn that the business was the company's but there is no evidence that they ever agreed to employment with the company – they only ever agreed to work for Mr Booth.

[24] After the end of the employment Ms Cousins provided a list of hours worked by them both. Those hours total 474 for Ms Cousins and 456 for Ms Harris. Mr Booth doubts that they worked these hours but there is no evidence to cause me to find that they did not. In the absence of any such evidence I accept these records are accurate.

[25] Ms Cousins should have been paid \$9,480.00 (net) but received nothing other than \$200.00 towards her travel expenses. Mr Booth is to pay her \$9,480.00 (net) as arrears of wages and holiday pay at 8% on the gross. Ms Harris should have been paid \$9,120.00 (net) plus holiday pay but received only \$300.00 (after allowing for the float). Mr Booth is to pay her \$8,820.00 (net) plus holiday pay at 8% on the gross.

[26] Counsel for Ms Cousins and Ms Harris was to provide copies of the source document from which the record of hours was compiled. I have issued this determination rather than wait for the information because otherwise there will be a considerable delay before I am available again. However, the source documents should still be provided and leave is reserved in case that affects the totals above.

Penalty

[27] During submissions, counsel for Ms Cousins and Ms Harris sought to amend their statement of problem to include a claim for a penalty for breach of good faith. I declined to allow any amendment because of the late notice.

Orders

[28] Mr Booth is to pay Ms Cousins \$9,480.00 (net) as arrears of wages and holiday pay at 8% on the gross.

[29] Mr Booth is to pay Ms Harris \$8,820.00 (net) plus holiday pay at 8% on the gross.

[30] Leave is reserved in case of any dispute about calculations.

[31] Mr Booth is to pay interest on these sums at the rate of 4.5% per annum starting on 16 March 2009 until the arrears and holiday pay are paid in full.

[32] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

[33] Given the outcome it is not necessary to add the company as a party to these proceedings.

Philip Cheyne
Member of the Employment Relations Authority