Employment Court of New Zealand

Noble v Ballooning Canterbury.Com Limited [2019] NZEmpC 98 (19 August 2019)

Last Updated: 21 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2019] NZEmpC 98
EMPC 85/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROBERT NOBLE Plaintiff
AND	BALLOONING CANTERBURY.COM LIMITED Defendant

Hearing:	15 and 16 April 2019 (Heard in Christchurch)
Appearances:	J Goldstein and L Ryder for the plaintiff A Toohey for the defendant
Judgment:	19 August 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Robert Noble, formerly of New Zealand but now residing in the United States, was asked to come to New Zealand to assist Ballooning Canterbury.com Limited (BCL) as a pilot-in-command of its balloons for some two and a half months.

[2] BCL is an adventure aviation company, operating balloon flights near Christchurch. At the material time, it owned two large balloons and a small one. The business was operated by its directors, Mr Michael Oakley as Chief Pilot, and his wife Mrs Kate Oakley who assisted in bookings and general administration.

[3] If he were to assist BCL, Mr Noble would need to travel to New Zealand, and obtain necessary approvals from the regulator, the Civil Aviation Authority (CAA), before he could commence flying. Following discussion, it was anticipated that he would be in a position to provide his services from early November 2015 to mid-January 2016. As it happened, various delays arose in the regulatory process. Once the necessary prerequisites had been attended to, he flew as pilot for five flights, three as a solo pilot over a period of 10 days from 22 November to 2 December 2015. In that period, difficulties occurred. The relationship was then terminated by BCL on 9 December 2015.

[4] Subsequently, Mr Noble raised a personal grievance on the grounds of unjustifiable dismissal. A dispute then arose as to whether he was an employee or an independent contractor. This was relevant not only to his claim, but to a counterclaim brought by BCL seeking damages for losses for which it was contended he should be liable.

[5] Ultimately the matter came before the Employment Relations Authority (the Authority) which determined that Mr Noble was not an employee; the Authority accordingly dismissed his claims, and BCL's counterclaim, for want of jurisdiction.1

[6] Mr Noble brought a challenge to that determination. The company protested jurisdiction by way of an application for strike out, again asserting that Mr Noble was not an employee.

[7] The parties then agreed that the question of status should be resolved by way of trial of a preliminary issue. The hearing to which this judgment relates was confined to that question.

Chronology

[8] Mr Noble is an experienced balloon pilot, who as mentioned, resides in the United States, but has worked in several countries. Prior to the events I am about to

1. *Noble v Ballooning Canterbury.com Ltd* [2018] NZERA Christchurch 25 at [137]-[138]. The Authority subsequently removed the issue of costs to the Court: *Noble v Ballooning Canterbury.com Ltd* [2018] NZERA Christchurch 49.

describe, he flew as a balloon pilot in New Zealand for another ballooning company, from 2000 to 2004. He did so on what he described as a "cash basis"; he said this meant that he was paid a sum in cash and was thereafter responsible for paying his own tax. He was not, however, registered for GST.

[9] In July 2015, Mr Oakley emailed Mr Noble stating that he needed a pilot from the middle of November 2015 to the middle of January 2016, because he would be out of the country for two weeks in early December, and for another two weeks shortly after Christmas.

[10] Subsequently, the two spoke by telephone and discussed terms and conditions. There is some but not complete agreement as to what was said. Mr Oakley said BCL offered:

- to pay Mr Noble on the basis of $400 per flight for either of two large balloons, and $200 per flight for the small balloon, with a minimum payment of $1,000;
- to pay $25 per hour for extra work other than pilot duties, if he wished to undertake such work;
- to pay Mr Noble's flights to and from the United States;
- to provide his accommodation and a vehicle for personal use;
- to provide free use of a balloon including the provision of LPG gas, and a crew, so that Mr Noble could complete his Biennial Flight Review (BFR, a regulatory requirement);
- to pay for a drug and alcohol test, and a first aid course;
- to provide a smartphone for calls relating to his duties, and a uniform; and
- to have statutory days off.

[11] Mr Noble does not accept Mr Oakley's account in several respects. First, he says the $1,000 retainer was to apply from the date he departed the United States; that date was ultimately agreed to be 1 November 2015.

[12] A second disagreement related to the operation of the retainer in practice. Mr Noble said he was offered a retainer of $1,000, plus an additional sum for each flight. He said he had been told there would be an average of five flights per week. Accordingly, potential income would be $3,000, if flying a large balloon.

[13] He also did not accept that he was offered or agreed to be remunerated a reduced amount for the small balloon at $200 per flight.

[14] The parties did not discuss Mr Noble's contractual status; nor was there an exchange of emails or other correspondence confirming what had been agreed. Mr Oakley, however, made a file note as to the terms he said had been offered.

[15] I interpolate Mr Oakley's evidence that Mr Noble would be required to fly if BCL had arranged bookings for a particular date; and that it was common ground that whether a flight which Mr Noble was to pilot would go ahead was dependant on his assessment of weather conditions.

[16] Mr Noble arrived in New Zealand on 3 November 2015. His travel costs were met by BCL. He attended a consultation with a medical aviation examiner on the day following his arrival. He was referred by that examiner to a cardiologist for an electrocardiogram. Unfortunately, there was a delay in the relevant result being forwarded by the cardiologist to the CAA who needed to consider the results of the medical examinations before it issued a medical approval; ultimately this occurred on 19 November 2015. Understandably, Mr Noble was concerned at this delay; he attempted to expedite the process as best he could.

[17] In the meantime, preparatory steps to ensure he had the necessary training and held the appropriate flight qualifications as required by the CAA were undertaken. On 6 November 2015, Mr Noble met with Mr Oakley and Mr Nicholson who was

responsible for maintenance of BCL's balloons; on that day the various manuals BCL was required to maintain were made available to

Mr Noble for familiarisation.

[18] On several occasions, Mr Noble flew as a passenger on BCL flights. He was provided with a vehicle for his use. On 9 November 2015, Mr Noble commenced residing in accommodation paid for by BCL.

[19] On 9 and 10 November 2015, Mr Noble flew in preparation for his BFR. In both instances, BCL paid for the LPG involved, and a crew.

[20] Problems arose between Mr Noble and Mr Oakley on 13 November 2015. Mr Noble said Mr Oakley flew a balloon through cloud; and that for approximately half an hour, the ground could not be seen again for the purposes of descent to land. This incident was subsequently discussed, and according to Mr Noble was the beginning of a fraught relationship.

[21] On 17 November 2015, Mr Noble assisted Mr Oakley and Mr Nicholson with certain annual tasks which needed to be undertaken with regard to two of BCL's balloons. This marked commencement of work for which BCL accepted Mr Noble was entitled to payment at $25 per hour.

[22] On 19 November 2015, Mr Noble crewed for Mr Oakley; Mrs Oakley said Mr Noble offered to do this. He was subsequently paid at $25 per hour for this flight. She also said Mr Noble was required to complete crew competency requirements.

[23] Later that day, Mr Noble advised Mr Oakley he had received medical approval from the CAA, which meant he could undertake final training for pilot-in-command status. So, on 21 November 2015, he piloted a commercial flight under Mr Oakley's guidance. BCL later accepted Mr Noble should be paid $400 in respect of this flight.

[24] The next day, 22 November 2015, Mr Oakley completed Mr Noble's training, and signed him off on a range of relevant documentation which certified he was fully qualified to fly as a commercial hot air balloon pilot.

[25] Thereafter, Mr Noble participated in five BCL flights on 23, 25, 26, 28 and 30 November 2015. Two of these were with Mr Oakley, those of 25 and 26 November 2015; for the remainder Mr Noble flew solo.

[26] After flying with Mr Noble on 26 November 2015, Mr Oakley departed to Australia for a few days. Several difficulties then arose.

[27] The first related to a flight intended for the next day, 27 November 2015. Mrs Oakley sent Mr Noble and a groundcrew member responsible for the picking up of customers, an email providing phone numbers for customers who could be contacted in the event of a flight being cancelled. This was a normal pre-flight practice. On this occasion she provided Mr Noble's phone number to a foreign passenger who was self-driving. That person telephoned Mr Noble apparently seeking information as to the location of the anticipated meeting point.

[28] Mr Noble was concerned that communications such as this would compromise his flight and duty time requirements. These were required under a CAA Rule which required the holder of an adventure aviation operator certificate to ensure a scheme was established for the recording and regulation of flight and duty times so as to provide suitable rest for pilots; BCL operated such a scheme. Mr Noble was concerned not only that customers were contacting him, but that if he cancelled a flight in the early hours of the morning, he was expected to then communicate with customers. He considered that such steps would infringe the flight and duty requirements of the approved scheme.

[29] With regard to the pre-flight emails which were routinely sent, Mrs Oakley accepted that in this one instance Mr Noble was required to liaise with passengers, because she would not be available, but this was not normally the case. She also said information as to details of a flight including a description of customers, needed to be provided to the pilot-in-command since he did not have the booking forms and would not know how many passengers were to fly on a given flight.

[30] The flight of the next day, 28 November 2015, ran into serious difficulties. Mr Noble flew over a pig farm at a height which led to the death of one pig and injury

to several others. Mr Noble said that although he knew there was a pig farm in the area which was a prohibited flying zone, he had not been shown where the farm was and had no idea that he was about to fly over the property.

[31] Differences then arose between the parties as to whether Mr Noble should have been aware of the location of the pig farm; and as to the appropriate way in which the Flytec recorder of the balloon should be treated after the incident. These issues are the subject of BCL's counterclaim; in this judgment I make no findings with regard to these circumstances.

[32] The flight for 1 December 2015 was initially called on by Mr Noble. However, following a conversation with Mrs Oakley in which she expressed concerns as to whether the flight should proceed, Mr Noble cancelled it. It was, as mentioned earlier, his responsibility to assess the weather conditions and determine whether any flight should proceed. There was a

subsequent email exchange between Mr Noble and Mr Oakley who was still in Australia. In it, Mr Oakley made comments as to weather conditions in the area in which flights might be undertaken. For his part, Mr Noble said that although he had called the flight off, on reflection he could have flown. He said he was getting a better grip on local conditions, but if Mr Oakley had time, his thoughts would be helpful. Mr Oakley responded with his opinions.

[33] In the same period, communications took place concerning Mr Noble's remuneration. On 29 November 2015, Mrs Oakley, who said she had not given too much thought as to whether Mr Noble would be an employee or a contractor, asked Mr Noble for his IRD number and PAYE code so as to work out his wages. He responded the next day by stating he had not had an IRD number since before 1990, and that usually he was paid as a contractor, responsible for sorting out his own tax. He asked Mrs Oakley to express her preference. She replied on 1 December 2015 stating that his preference to be paid as a contractor was acceptable; she requested his GST number, so that she could write up appropriate receipts, and so that BCL's accountant would know what the payments were for. This was also needed so that GST could be claimed back for the business.

[34] Mr Noble then telephoned Mrs Oakley to discuss the issue further. He referred to the arrangement operated by the ballooning company for whom he had previously flown, who had paid him cash and left him to sort out his own tax; Mrs Oakley said that in this conversation, Mr Noble explained that earnings obtained when based in the United States were not taxed. All of this suggested an informal cash arrangement.

[35] As a result of this conversation, Mrs Oakley contacted the Inland Revenue Department (IRD), and her accountant. This led to her presenting to Mr Noble the three legal options which she had been told could be adopted. These were:

- That Mr Noble be treated as an employee, in which case he needed an IRD number and a tax code, and PAYE would be deducted.
- That he would be a contractor with a GST number; 15 per cent GST would be added to the amount charged for services.
- That he would be a non-resident contractor, who would have to complete a non-resident tax return. The extent of tax which BCL would then have to pay would depend on whether Mr Noble obtained a valid certificate of exemption which would reduce the potential tax liability from 30 per cent of earnings to 15 per cent.

[36] She also confirmed that previously she had assumed that as a New Zealander, Mr Noble would have had an IRD number, and BCL would have paid wages.

[37] On 2 December 2015, Mr Noble cancelled the flight scheduled for that day. Later, he sent an email to Mr Oakley, covering several topics by way of update.

[38] The first related to the events leading to the cancellation of the flight intended for the previous day, which had occurred after the conversation between Mrs Oakley and Mr Noble. He said he now believed his original call had been correct and that he should have flown. Plainly, he did not think it appropriate for Mrs Oakley to intervene in a decision which legitimately had to be made by him as pilot.

[39] He then said that a second problem which was causing him some stress, was non-adherence to the prescribed time and duty rules. He said he had spoken to other pilots who had informed him that if the CAA was appraised as to the approach being adopted by BCL, its operating licence would be suspended, and the CAA would prosecute the individuals involved.

[40] Next, he referred to the incident concerning the flight over the pig farm; he said he had been told by friends not to make any statement which could self-incriminate; notwithstanding this advice, he had cooperated with BCL and provided a report. He said he was also concerned at the discussion that had occurred with Mrs Oakley concerning the Flytec recording of this flight.

[41] He went on to say:

As you may understand I feel like taking a break for a few days but I also have to sort out being paid. [Mrs Oakley] has sent me a list of options, none of which are acceptable to me as they are not what I originally agreed to. I have spoken with contacts in two major airlines in NZ that employ contract pilots and they both told me the same story. The airline company is not interested in the contract pilots [PAYE] number, [GST] number etc or [their] personal tax position, that is the business of the pilot. The pilot gives them an invoice and they pay on invoice whether he is local or from overseas. I have also spoken to some pilots who have used this system in the past few years and have not had the problems that I am facing. Also in these discussions I have discovered that the airlines pay for medicals and BFR's which is something we should have talked about. I feel that we need to renegotiate my terms of employment taking into account the above and the fact that big balloon pilots in Australia are paid considerably more per flight than $400. Back in 2002 I was paid $440 per flight plus other [benefits]. As I said I will take a few days off so as to give you time to think where we go from here but I think it would be more than an act of goodwill if some money [owing] was put in my bank account.

...

[42] Mrs Oakley then decided to make a payment to Mr Noble that day, based on services rendered by Mr Noble between 17

and 26 November 2015. A gross sum of

$1,575 was paid, based on Mrs Oakley's understanding of the agreed payment arrangements. The description of the payment, as recorded on Mr Noble's bank statement, was "bill payment". No PAYE was deducted.

[43] For his part, Mr Oakley was concerned that Mr Noble said he was "taking a break for a few days", apparently to provide an opportunity to renegotiate contract terms, in circumstances where he had flown five times for BCL, and only on three occasions as solo pilot. He was also concerned because Mr Noble had not telephoned either Mrs Oakley or himself before advising that he would take time off, there apparently being a BCL flight scheduled for the following day. From Australia, he endeavoured to contact Mr Noble by phone, eventually reaching him mid-evening. He said the most immediate query he raised with Mr Noble related to the continued operation of the business, and when Mr Noble intended to resume work. He said Mr Noble repeated he was taking a few days off. He refused to provide any date or time for his return. Mr Noble told the Court he did not recall this conversation.

[44] Mr Oakley decided he needed to return to New Zealand to sort these issues out, and to provide cover for the business. He told Mr Noble that flying was suspended until he returned home.

[45] Also, on 2 December 2015, a report on the flight and duty issue was provided by Mr Andrew Shelley of Aviation Safety Management Systems Ltd, who provided advice to BCL on its technical requirements. In short, he said that BCL's flight and duty scheme had been approved by the Director of the CAA (the Director) in 2014. It was Mr Shelley's view that the scheme would not be infringed if a pilot had to wake early to check the weather and decide whether to proceed or cancel the flight prior to

3.00 am.

[46] On either that or the next day, Mr Noble attended the Oakleys' residence with the report. According to Mrs Oakley, who was on the phone to her lawyer at the time, he was threatening and intimidating. Mr Noble denied this. He said he wanted to discuss the content of Mr Shelley's report with him, in the presence of a representative from the CAA and Mrs Oakley, so that the issues could be explained clearly. Mrs Oakley declined to do so, since Mr Oakley was about to return to New Zealand and he could deal with the issue then. The conversation was obviously difficult for both parties.

[47] On the afternoon of 3 December 2015, Mr Noble telephoned Mrs Oakley to say he was expecting an email from Mr Oakley, which had not arrived. He asked whether there would be any flying the next day. She said that under the circumstances there would be no further flying until the outstanding issues were resolved.

[48] Mr Oakley said that he returned on 4 December 2015. By then, he and Mrs Oakley had become very concerned at Mr Noble's actions.

[49] In consultation with BCL's lawyer, Mr Wakefield, a letter was prepared and provided to Mr Noble on 4 December 2015, asking him to attend a meeting to discuss five issues, which I summarise:

a. The manner of payment and whether Mr Noble was to be treated as an employee, or an independent contractor.
b. The flight of 28 November 2015 which had caused damage at the pig farm, as indicated in a vet's report and photographs which had, by this time, been emailed to Mr Noble.
c. The communication between him and BCL in respect of the Flytec recorder.
d. The advice given to BCL that he would not be available for duties, without seeking prior agreement.
e. Other general communication issues regarding the assessment of weather, passenger liaison, resting hours, and clarification over rates and benefits.

[50] The letter went on to state that all flying would be suspended until these issues were resolved.

[51] That meeting took place, as scheduled. Mr and Mrs Oakley attended with Mr Wakefield. Mr Noble was asked whether he wanted a support person; he said he did not.

[52] Mr Oakley, Mrs Oakley, and Mr Wakefield, stated that the first topic which was discussed related to Mr Noble's status. In the course of the discussion, he explained how he had been paid when he worked for the ballooning company for whom he had flown; that is, he was paid cash and was responsible for his own tax. For his part, Mr Noble told the Court that "... there was mention of the IRD and my employment status during this meeting. I believe I insisted that I was an employee and that the company would have to take the tax off". Each BCL witness said Mr Noble did not say he wished to be treated as an employee.

[53] There was also discussion as to how the retainer was to operate, and the date from which it was to be paid.

[54] After discussing other topics, Mr Wakefield asked if there was a way forward. Mr Noble said "No".

[55] That evening, Mr Noble sent an email to Mrs Oakley, providing his IRD number. She subsequently telephoned the IRD and was told that this was a pre-existing number.

[56] The next day, Mr Wakefield was instructed to prepare a letter terminating the relationship between the parties. It was sent on 9 December 2015. It relevantly stated:

We note that yesterday2 you have provided us with your IRD number however we are still awaiting notice from you as [to] whether you are wishing to be paid with PAYE deductions or alternatively as a non-resident contractor. If you choose PAYE deductions you need to provide us with the appropriate tax code. If you wish to be employed as a non-resident contractor (without an Exemption Certificate) you will then be deducted 30% withholding tax.

...

After giving the matter serious consideration, and taking all of your explanations into account, we are of the view that the relationship between BC Ltd and you, whether it be independent contractor or employee, has been damaged to such an extent that it would be deleterious for the relationship to continue. Accordingly, we advise that the relationship between BC Ltd and you is cancelled therefore at an end.

...

2. The letter was drafted on 8 December 2015, at which point the reference to the provision of the IRD number "yesterday" would have been correct.

[57] In its letter, BCL went on to say that a payment would be made based on a gross figure of $5,000 based on the retainer sum of $1,000 per week. PAYE or withholding tax would be deducted, as well as an allowance for the sum previously paid of $1,575.

[58] Mr Noble then sent an email to Mrs Oakley, confirming his PAYE tax code of "M", which meant BCL was then able to effect payment to him as had been indicated.

[59] There were two versions of this email before the Court; the first was dated 9 December 2015, timed at 3.03 pm, some 22 minutes before BCL's termination letter was sent. The second was dated 10 December 2015, timed at 9.03 am. The difference is accounted for by the fact that the first was printed via Mr Noble's Californian email provider; whilst the second was printed via BCL's New Zealand email provider. For the purposes of the chronology, it is the second document which is accurate. I conclude it was sent by Mr Noble in response to BCL's termination letter on 10 December 2015.

[60] By 15 December 2015, Mr Noble had instructed a lawyer, Mr Goldstein. He wrote to BCL asserting that there had been an employment agreement, that Mr Noble had been unjustifiably dismissed, and that a personal grievance was accordingly raised for Mr Noble. Remedies for lost wages, compensation and penalties were sought.

[61] Mr Wakefield responded briefly in an email of 15 December 2015, rejecting the claim on behalf of BCL.

[62] The parties then attended mediation, which did not result in a resolution of the parties' issues. Thereafter, a statement of problem, and an amended statement of problem were filed by Mr Noble in which it was asserted there had been an employment agreement.

[63] Mr Wakefield filed a statement in reply, in which liability was denied. That document did not make an express assertion that Mr Noble had not been an employee and/or that a protest as to jurisdiction was being raised.

[64] However, it appears this point was taken by Mr Wakefield at the first case conference with the Authority. BCL's position in that regard was described in a statement of counterclaim which sought the reimbursement of various costs incurred by BCL from Mr Noble, subject to the Authority's determination of jurisdiction. I infer from the pleadings that BCL thereby asserted the Authority did not have jurisdiction because there had not been an employment relationship.

[65] Subsequently, the Authority ruled that there was a preliminary issue to be resolved on the issue of status, which led to the determination that is now challenged.

Overview of parties' cases

[66] In summary, Mr Goldstein submitted for Mr Noble:

a. The parties never reached an agreement as to Mr Noble's status. There was an exchange, following the taking of advice from an accountant, as to modes of payment, but that was inconclusive. A number of other factors, however, pointed to a mutual understanding as to status, namely the facts that statutory holidays would not be worked; that all expenses would be paid; that Mr Noble was an hourly-waged worker for non-flying duties; and that he was to be paid a

retainer/salary. A form he was required to sign referred to him as an employee. A wage and time record were maintained with wages being paid after deduction of PAYE and ACC levies. A range of duties were prescribed. Mr Noble was not required to arrange his own insurance cover. Mr Noble requested an employment agreement on several occasions. Mrs Oakley stated she assumed Mr Noble was to be regarded as an employee. Finally, the correspondence and pleadings of the parties after the relationship ended, conceded the understanding.

b. With regard to the control test, BCL exercised significant close control over all Mr Noble's activities. He was required to report to the Chief Pilot, Mr Oakley, and was not able to assign or delegate his own duties. Reference was made to the prescriptive nature of BCL's exposition, and the setting of tasks by BCL according to its requirements. Mr Noble was

engaged to work for BCL on a full-time basis and was paid an hourly wage for all non-flying duties. It provided all necessary equipment to enable Mr Noble to perform his role.

c. Turning to the integration test it was submitted Mr Noble's work was an integral part of the business. He was provided with a uniform which he was required to wear. He was not identified as a contractor. He was required to refuel balloons and undertake other ground-crew duties. He was a frontman for the business, with significant passenger contact.

d. Finally, a consideration of the fundamental test supported the same conclusion. Mr Noble did not operate his own business; he had no financial risk as he was paid a weekly retainer of at least $1,000, being a sum he would receive whether or not he flew. His income was not linked to the profit or loss of BCL. He did not operate a separate legal entity. He was not required to provide any tools or equipment and did not claim expenses for his work. He was provided with a car, and his tickets to and from the United States were paid for by BCL. BCL paid all insurances. He was not registered for GST and did not render invoices; by contrast he provided an IRD number and tax code to BCL. BCL in fact treated him as an employee, paying PAYE and ACC levies.

[67] In summary, Ms Toohey submitted for BCL:

a. No real consideration was given to the status of Mr Noble prior to his commencement with BCL on 22 November 2015. However, on 1 December 2015, the parties exchanged emails which resulted in an agreement that Mr Noble would be paid as a contractor. This was confirmed the next day in Mr Noble's long email, and at the meeting held on 7 December 2015. The deduction of tax on a PAYE basis after the termination of the relationship was simply a legal means of finalising payment, because no GST number, invoice, or certificate of exemption had been provided.

b. The statement of reply filed for BCL in the Authority is of no assistance on the issue before the Court, there being no binding concession.

c. The context for the consideration of all matters in this case, and particularly the control test, is the statutory overlay provided by applicable CAA Rules. Those rules would apply to any pilot, whether that person is an employee or an independent contractor. As a pilot-in-command, Mr Noble exercised considerable autonomy.

d. The integration test should be assessed on the basis that Mr Noble flew only three solo flights as a qualified pilot. He worked for a total period of 10 days before advising that he was going to take a break for several days, following which he did not return.

e. To the extent Mr Noble suggested he sold paraphernalia to customers, any cash collected was confined to small amounts for caps and pins. This was an issue that had only been raised in the Court and should be treated with scepticism.

f. The provision of tools and equipment could not sensibly be relevant in this case, given that Mr Noble had to travel from the United States. There were legislative and regulatory requirements as to what equipment should be used. This factor was not relevant.

g. Finally, with regard to the fundamental test, it was clear Mr Noble wished to be treated as a contractor. He accepted in evidence he knew that the deduction of PAYE meant he would be an employee, and he readily rejected the suggestion he be paid on that basis. While the contract was on foot he was paid a gross amount. The circumstances do not lead to a suggestion that he was fundamentally part of BCL's enterprise.

h. Accordingly, it was clear beyond doubt that the real nature of the relationship showed he was not an employee but worked under a contract for services.

Legal principles

[68] Section 6 of the Act, which is central to the issue before the Court, relevantly provides:

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

...

(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.

...

[69] In the leading authority, *Bryson v Three Foot Six Ltd (No 2)*, the Supreme Court held that the Court must consider all relevant matters, which include:3

a. The written and oral terms of the contract which will usually contain indications of common intention as to status.
b. Any divergences from or supplementation of those terms and conditions, evident from the way in which the relationship operated in practice; what is important is the way in which the parties have actually behaved in implementing their contract.

c. The reference to "all relevant matters" also requires consideration of features of control and integration, and whether the contracted person has been effectively working on his or her own account (the fundamental test), all as determined at common law.

3 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34; [2005] 3 NZLR 721; [2005] ERNZ 372 at [32].

d. But it is not until there has been an examination of the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the real nature of the relationship in light of the control, integration and fundamental tests.

[70] As Judge Perkins observed in *Clark v Northland Hunt Incorporated*, none of the common law tests individually will necessarily be conclusive, although respective weight will be placed upon them depending upon the overall factual matrix.4 What is important is an overall impression of the underlying and true nature of the relationship between the parties.5

Credibility

[71] It is necessary to evaluate carefully the evidence, written and oral, given by the parties, particularly in a case such as the present where there is no written agreement between the parties which will usually assist the assessment of terms and conditions, as noted in *Bryson*.

[72] Mr Noble's evidence was fully tested in cross-examination. It emerged there were multiple areas of unreliability. In several instances, he had no recollection, or no accurate or complete recollection, of key events such as the discussion as to rates of remuneration. He also gave evidence about matters he had not referred to previously when giving evidence in the Authority.

[73] But of greater concern were inconsistencies in the case he presented to the Court, when compared with the case he presented to the Authority. I have referred to two of these already.

[74] The first relates to the question of whether he referred to the IRD or his employment status during the meeting of 7 December 2015. I have recorded Mr Noble's evidence to the Court that there was mention of the IRD, and his

4. *Clark v Northland Hunt Incorporated* [2006] NZEmpC 119; (2006) 4 NZELR 23 at [22], applying *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374.
5. McGrath J in the dissenting judgment of the Court of Appeal: *Three Foot Six Ltd v Bryson* [2004] NZCA 276; [2004] 2 ERNZ 526.

employment status, and that he believed he insisted he was an employee and that BCL would have to take the tax off. By contrast, he told the Authority that there was no mention of the IRD or his employment status during the meeting. The evidence given by Mr Noble to the Court conflicted with his own previous evidence, his own previous emails, and the evidence given by BCL witnesses. It is unreliable.

[75] The second relates to the timing of Mr Noble's email informing Mrs Oakley of his tax code. In the Authority, and in his evidence-in-chief, Mr Noble said this email was sent to Mrs Oakley before BCL sent its termination letter. In fact, as indicated earlier, the reverse was correct.6 Although the two relevant emails were before the Authority, Mr Noble advanced his case there on an incorrect basis which led the Authority into error.

[76] I find the evidence given by Mr and Mrs Oakley was accurate and consistent with contemporaneous documents. Where there is a conflict between Mr Noble's evidence and the evidence of Mr and Mrs Oakley, I prefer theirs.

Common intention

What did the parties say as to their intentions?

[77] As already mentioned, there was no discussion as to status in the parties' initial conversations.

[78] Mr Noble told the Court that he requested an employment agreement repeatedly. I do not accept this evidence. I have no doubt that had such a request been made, the issue would have been dealt with, one way or the other, when it was raised. Moreover, the proposition that there was such a request is inconsistent with Mr Noble's stated preference in his emails of 30 November and 2 December 2015 that he wished to be paid the sum which he said had been agreed, and then be responsible for his own tax, a point he again emphasised at the meeting on 7 December 2015.

[79] Although Mrs Oakley initially assumed BCL would deduct PAYE, when Mr Noble said he did not want to do this but wanted to be paid on a gross basis and to

6 Above at [59].

be responsible for his own tax arrangements, she agreed. She paid a gross sum to Mr Noble, noting it as a "bill payment". I accept Ms Toohey's submission that this suggested a common understanding that Mr Noble would not be treated as an employee. As already indicated, it was a preference which Mr Noble continued to express up to the end of the relationship.

[80] Mr Goldstein placed some weight on the statement made in Mr Noble's email of 2 December 2015 that he said he wished to renegotiate "his terms of employment". Such a submission has to be considered, however, alongside other statements made by Mr Noble in the same email, where he indicated that contacts in two major airlines had explained to him how a contract arrangement was supposed to work, with tax being the business of the pilot who would submit an invoice. Such a system, he said, would avoid the problems he was facing. His use of the word "employment" in one sentence, must therefore be understood in the generic sense of remuneration for work. I find the word was not used in its specialised sense.

[81] In summary, up to the point where the relationship was terminated, Mr Noble had not said he wanted to be treated as an employee; rather, his expressed preference was for a payment arrangement which would apply to an independent contractor.

[82] Turning to post-termination factors, I do not regard the fact that Mrs Oakley's use of the PAYE regime at that stage meant Mr Noble became an employee. In the absence of GST registration, an invoice or a certificate of exemption – or an indication any of these would be provided – she understandably considered she had no choice. BCL was clearly wanting to treat Mr Noble fairly and in accordance with the law; despite the differences of opinion as to how the retainer regime was supposed to work, BCL took a sum which related to five weeks, $5,000, in order to reimburse him for his services, then deducted tax and the amount already paid.

What did the parties say about remuneration?

[83] Next, it is necessary to review the parties' discussions as to remuneration in order to assess whether these shed light on the real nature of the relationship. It is common ground that there was an agreement; the issue relates to some of its details.

[84] Dealing with each of the points of dispute, I am satisfied the offer as to a retainer was as described by Mr Oakley. That explanation was completely consistent with the system operated for BCL's casual employees as verified by their agreements. I have no doubt that was the system explained to Mr Noble. I do not accept his evidence that it was agreed he would be paid the per-balloon flight rate as a "bonus", in addition to the retainer. I accept Mr Oakley's evidence that the issue was agreed in accordance with his explanation.

[85] I find the per-flight rates offered were as recorded in Mr Oakley's contemporaneous file note: $400 for the large balloons and $200 for the small balloon only if Mr Noble wished to fly that balloon. Mr Noble said he did not recall the later detail. I accept Mr Oakley's evidence that this was offered and agreed at the time. I also note that the breakdown of the first payment made to Mr Noble is consistent with these recorded rates.

[86] Having regard to the evidence of commercial flights flown by BCL in 2015/2016, evidenced in a schedule produced to the Court by BCL, I find it inherently unlikely that Mr Noble was told he would undertake an average of five flights per week. Mr Oakley said this was not the case, because of weather issues and the downturn in tourism caused by the Christchurch earthquakes. Not only was such representation unlikely having regard to flight history, but there would be no need to provide the cushion of a retainer to Mr Noble – or other pilots retained by BCL – if this was the case. His expectation, therefore, of remuneration of $3,000 per week – based on the assumption of a retainer of $1,000, and five flights at $400 – was based on a misunderstanding by Mr Noble.

[87] I do not accept that these rates, and the rate of $25 per hour for work done outside of pilot duties, such as crew work, necessarily mean there was an employment relationship. These rates are equally consistent with an independent

contracting arrangement.

[88] The keeping of a time and rate record, to which a PAYE code was added after termination, is also a non-determinative factor.

Other factors

[89] According to Mr Oakley's file note, Mr Noble would have "stats off". Mr Noble said he understood Mr Oakley would be available to pilot at Christmas, and he would be able to visit family members who resided in New Zealand. I accept Mr Oakley's evidence that the ability for Mr Noble to visit family and friends on such days off was of importance to him. In the absence of any evidence that there was any discussion or agreement as to entitlements under the Holidays Act 2003, this factor does not assist.

[90] A templated form prepared by the Drug Direction Agency was signed by the parties on 5 November 2015, soon after Mr Noble arrived in the country. In it, he consented to the result of a "pre-employment" drug and alcohol test being communicated confidentially to his "employer". For its part, BCL had a standard alcohol and drug test form which the parties signed the previous day, which referred to the company's ability to make "employment decisions". There is no evidence that either party gave any consideration at that time to the use of this language in these documents.

[91] The remainder of BCL's forms signed at various dates in November 2015, referred to Mr Noble as being "an individual", or a "person", or "personnel", but not an "employee". Mr Oakley said the company did not have special forms for different people. I do not regard the forms described in the previous paragraph as being significant.

[92] That Mr Noble was certified to conduct crew activities was, I find, to ensure he was familiar with the relevant responsibilities when acting as pilot-in-command.

[93] With regard to the pleadings before the Authority, I am not persuaded that a binding concession was made by BCL. There is no evidence that BCL gave instructions to acknowledge Mr Noble was an employee. BCL's position could have been stated more clearly, but the issue of status was raised with the Authority at an early point, and accepted by it as being live.

Payment by cash?

[94] Mr Noble referred to the prior work arrangement in New Zealand, where he had been paid cash and was responsible for his own tax. He did not say whether he in fact paid tax for this work, although he told Mrs Oakley he did not pay tax in the United States. As described earlier, he favoured an arrangement where he would deal with any liability. Following the meeting of 7 December 2015, Mr Wakefield, concluded that Mr Noble's preference for this option, together with his insistence that he needed to receive the amounts which had been agreed without deduction, strongly suggested he wished to be paid cash and to avoid paying tax at all. Mrs Oakley said she was alarmed by this because a cash payment which facilitated avoidance of tax would be illegal.

[95] Mr Noble did not explain why the deduction of PAYE could lead to a different net result for him, were he to meet his own liability if paid on a gross basis.

[96] Mr Noble denied that he was trying to avoid tax. However, he left himself open to an inference that this was his motive because he did not explain how he would deal with this issue.

[97] The central point, as discussed earlier, is that Mr Noble by making these statements indicated he did not want to be paid as an employee. Indications of acquiescence in a PAYE arrangement only occurred after termination and, as noted, was to expedite payment.

Civil Aviation Rules

[98] An important matter of context when assessing the real nature of the relationship is provided by Part 115 of the Civil Aviation Rules, promulgated under Part 3 of the Civil Aviation Act 1990. This particular Part deals with the requirements which the Director must be satisfied about before issuing a relevant approval to an adventure aviation operation. Flight in a hot air balloon is such an operation.7

7 Civil Aviation Rules, r 115.11(b)(1)(iv).

[99] Rule 115.79 requires such an operator to provide the Director with an "Adventure aviation operator exposition". The rule describes the requirements which must be included in manuals to be established by the operator and approved by the Director, which, in summary, define the adventure aviation organisation and demonstrate the means and methods for securing ongoing compliance with the requirements of Part 115, and any other applicable CAA Rule.

[100] Under r 115.51, such an operator must employ, contract or otherwise engage sufficient personnel to perform the operations listed in the applicant's exposition.

[101] A set of manuals was developed for BCL so as to meet these requirements. Extracts from BCL's Exposition Overview Manual, its Management Manual and its Operation Manual were before the Court. The Overview Manual contains the following statement:

This manual and the associated manuals ... comprise the Exposition that defines the procedures whereby Ballooning Canterbury will conduct Adventure Aviation Operations which meet required levels of safety, regulatory requirements, and a high level of customer satisfaction. All company personnel are required to comply with the exposition at all times while providing flights governed by Civil Aviation Rule Part 115, or while performing any activity that is related to such flights.

[102] The manuals were provided to Mr Noble at an early point. He accepted that he was required to be familiar with them, and to comply with their contents. As required under the various provisions, his relevant competencies and knowledge of their content was recorded.

[103] At this stage it is necessary only to emphasise the elaborate description of responsibilities under the CAA regime for a pilot-in-command, as explained, for example, in the Management Manual, as well as in other provisions of the exposition and CAA Rules.

[104] Two points may be made. The first is that the CAA regime assumes that the operators' exposition will apply to all personnel, whether those persons are contractors or employees, as is made clear in r 115.51. Secondly, considerable discretion is

bestowed on a pilot-in-command, before, during, and after a flight. The position is summarised in s 13 of the Civil Aviation Act 1990, which states:

13 Duties of pilot-in-command

The pilot-in-command of an aircraft shall—

(a) Be responsible for the safe operation of the aircraft in flight, the safety and well-being of all passengers and crew, and the safety of cargo carried; and
(b) Have final authority to control the aircraft while in command and for the maintenance of discipline by all persons on board; and
(c) Subject to section 13A of this Act, be responsible for compliance with all relevant requirements of this Act and regulations and rules made under this Act.

[105] Such a person is ultimately under the oversight of the regulator who can revoke the pilot's aviation document which permits that person to fly; and that person can be prosecuted by the regulator for safety offences.

Control

[106] The Court is to have regard to the control test, which involves an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it. As was observed in *Clark*, the greater the level of control, the more likely the Court will be prepared to find that a contract of service exists.8

[107] It is worth mentioning two cases where a relevant factor when considering the control test related to the statutory obligations held by the worker, albeit in contexts differing from the present. The first, *Chief of Defence Force v Ross-Taylor*, involved a medical practitioner accountable to the requirements of the Medical Council of New Zealand, as regulator, in respect of the performance of her duties.9 The second, *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones*, involved a physiotherapist, again subject to statutory regulation but who it was acknowledged exercised a high degree of autonomy in relation to the work she undertook.10

8 *Clark v Northland Hunt Incorporated,* above n 4, at [30].

9 *Chief of Defence Force v Ross-Taylor* [2010] ERNZ 61; [2010] NZEmpC 22 at [34].

10 *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224 at [43].

[108] I return to the pilot-in-command responsibilities contained in the various manuals of BCL's exposition, which emphasises the pilot's autonomy. General responsibilities are described in detail; these include the requirement that the pilot-in-command is responsible for compliance with the exposition, in accordance with the CAA Rules. It is plain from these and other stated responsibilities that the pilot-in-command must ensure that groundcrew, and the crew member who participates in a flight, comply with their responsibilities, of which the pilot must have a proper understanding. Pre-flight

responsibilities of the pilot are described; for instance, the selecting of a launch site, oversight of the inflation of the balloon and other crew responsibilities, the checking of meteorological information, and the maintenance of a flight record. Inflight responsibilities include the safe operation of the balloon in accordance with its flight manual and the monitoring of passenger-safety and welfare. Specific post-flight responsibilities are also described, including the maintenance of flight and duty records by the pilot.

[109] Finally, I refer to the requirement to monitor personal wellbeing, with the specific obligation that if a pilot has reason to doubt his or her fitness for duty, then that duty should not be performed.

[110] The statements contained in the exposition, as already indicated, arise from CAA Rules which apply to contractors and employees. Obviously, these rules bestow significant autonomy on a pilot in relation to a given flight, again in accordance with the Civil Aviation Act 1990, and Part 115 of the CAA rules.

[111] Mr Goldstein outlined a number of factors which he said showed BCL exercised significant "close control" over Mr Noble's activities. Most significant amongst these was the fact that flights were required to be undertaken at times specified by BCL. That apparent control was, however, tempered by the fact that the final decision as to any particular flight was weather dependent so that the assessment as to whether the flight should proceed lay with Mr Noble. The fact that he then had to communicate with others indicating whether a flight was on or off in the early hours of the day of flight was a necessary consequence of that responsibility.

[112] Factors such as minor communication with customers by telephone, a responsibility to report to the Chief Pilot who could in fact direct a pilot not to fly, and the supply of equipment by BCL (in circumstances where Mr Noble as an overseas' resident obviously could not), are indicators of control, but they are outweighed by the contextual matters I have reviewed.

[113] I conclude that BCL's ability to control Mr Noble's work could only be undertaken in light of the CAA obligations. The central point is that the various elements of control would have been the same whether Mr Noble was an employer or a contractor. In my view, the control test does not lead to a conclusion that Mr Noble must have been an employee. He could equally have been a contractor. This test is neutral.

Integration test

[114] Under the integration test, if a person is employed as part of the business and his or her work is done as an integral aspect of it, there is a contract of service. Under a contract for services, the work, although done for the business, is not integrated into it but is an accessory to it.11 In *Challenge Realty Ltd v Commissioner of Inland Revenue,* the Court of Appeal suggested that an element of this assessment is whether the person was "part and parcel of" or integrated into the enterprise of the work operation.12

[115] Whilst I accept Mr Goldstein's submission that without a pilot, the business could not operate, and that he had a range of duties essential to the operations of the business, that is not the end of the relevant assessment.

[116] The Court must also consider the reality that the relationship was in fact confined, with Mr Noble participating in only five commercial flights. Whilst the relationship came to an end earlier than had been expected, it had been anticipated that he would share pilot duties with Mr Oakley when he was available, and that he would provide his services to mid-January 2016, only another four weeks beyond its actual

11. *Stephenson, Jordan and Harrison v MacDonald and Evans* [1952] 1 NZLR 101, per Lord Denning.

12 *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42.

duration. These circumstances suggest that as a pilot providing temporary services, he was not part and parcel of BCL's business.

[117] Mr Goldstein submitted that he was a frontman for the business, having significant passenger contact, including the collection of small amounts of cash. Much of his contact with passengers was as pilot-in-command. He may have collected small sums for the payment of paraphernalia, but I find that in the main, fees or purchase prices were paid for by EFTPOS, which Mr Noble did not operate, since crew members attended to this. That he wore a uniform and cap is not determinative.

[118] On balance, I am not satisfied that the consideration of integration factors supports a conclusion he was an employee.

Fundamental test or economic reality test

[119] The final test has been variously described as either the "fundamental test", "the economic reality test" or whether the person was in business on his or her own account.13

[120] Mr Goldstein submitted that Mr Noble was not operating his own business, and he had no financial risk, since he was

paid at least $1,000 a week. Nor, it was argued, did he operate as a legal entity, provide any tools or equipment, or carry any insurance.

[121] Such factors as these are not the only matters for consideration. The operation of a separate legal entity is not an essential pre-requisite of a person who chooses to be an independent contractor. Similarly, whilst the provision of tools and equipment and the taking out of insurance may point to a contract for services, the absence of these factors does not necessarily lead to a conclusion the person is therefore an employee.

[122] As Ms Toohey submitted, in the present case Mr Noble had travelled from the United States. There were elaborate legislative and regulatory requirements as to what

13 *Chief of Defence Force v Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [40].

equipment could be used. There was no possibility that he could provide these for the purposes of a short-term contract. That BCL paid various expenses relating to the provision of services by Mr Noble (including travel, accommodation and the provision of a vehicle for his use), was an unsurprising consequence of the fact that an overseas' pilot was being brought in for a short assignment.

[123] Mr Noble told the Court that he was a very experienced hot air balloon pilot, having been trained with "some of the best pilots in the world, flying large balloons". He had flown not only for some years in New Zealand, but in other countries such as Mongolia, Angola and Haiti. His summary of hours of pilot experience confirm this, particularly as pilot-in-command of large balloons. All of this tends to suggest significant experience and expertise. He had previously operated as a contractor providing professional services. On this occasion he was prepared to travel to New Zealand for a limited period to provide those services, for which he said he wanted to be paid on a basis where he would pay his own tax with his expenses being met. I find he was in business on his own account.

Industry practice

[124] Mr Noble gave some evidence as to practices adopted by persons whom he had spoken to, which tended to suggest independent contracting arrangements. Whilst industry practice can sometimes be a useful factor, here the evidence was vague and unspecific, and did not amount to a reliable evaluation of wider practice. I place that evidence to one side.

Conclusion

[125] It is obvious that the absence of a written agreement has led to significant difficulties between the parties. However, I am satisfied that during the parties' short relationship, Mr Noble did not state he wished to be treated as an employee; to the contrary he wished to be paid on a gross basis which indicated a contract for services. Nor am I satisfied that there is any other factor which establishes the parties had a common intention that Mr Noble was, during the relationship, an employee. The assertion that Mr Noble was an employee followed the termination of the relationship,

when his lawyer wrote to BCL on 9 December 2015. The deduction of PAYE, also after the termination of the relationship, was simply a means to effect payment.

[126] The control test is neutral and does not favour Mr Noble's case. The integration test does not establish that his work was performed as an integral part of the business; Mr Noble was a short-term accessory. Consideration of the fundamental test suggests he was a professional pilot in business on his own account.

[127] Standing back, I am satisfied that the real nature of Mr Noble's relationship was as a contractor, and not as an employee.

[128] Accordingly, I dismiss Mr Noble's challenge on the preliminary point. The result is the Court does not have jurisdiction to consider Mr Noble's claim; nor BCL's counterclaim which it was accepted could only proceed in this Court if Mr Noble was found to be an employee.

[129] I reserve costs which should be discussed between counsel in the first instance. These should follow the event. Any application for costs by BCL should be made within 21 days and responded to within 21 days; any reply may be filed seven days thereafter. The same timetable will apply to the Court's consideration of issues as to costs in the Authority, which have been removed to the Court.14

B A Corkill Judge

Judgment signed at 12.40 pm on 19 August 2019

14 *Noble v Ballooning Canterbury.com Ltd,* above n 1.