

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 25
3008232

BETWEEN

ROBERT NOBLE
Applicant

AND

BALLOONING
CANTERBURY.COM
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Linda Ryder and Jeff Goldstein, Counsel for the Applicant
Anne Toohey, Counsel for the Respondent

Investigation meeting: 1, 2, 3 and 27 (part day) November and 11(.5 day) and 21 (2 hours) December 2017

Submissions received: 11 December and 21 December 2017

Determination: 26 February 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Noble is a New Zealand citizen and a hot air balloon pilot who lives in the United States.

[2] Ballooning Canterbury.com Limited (BCL) runs a small commercial hot air ballooning operation in inland Canterbury. Michael Oakley and Kate Oakley run the business together. Mr Oakley is the director of BCL and its chief and, usually, only pilot. Mrs Oakley is a shareholder in BCL who undertakes administrative duties.

[3] During 2015, Mr Oakley knew that he would be away in Australia for a number of weeks. He also thought that he might need to have back surgery, which

would require several weeks off work while recuperating. Therefore, BCL required another pilot for up to two months over the 2015 to 2016 summer. Mr Noble was engaged and arrived in New Zealand on about 3 November 2015.

[4] On 22 November 2015, Mr Oakley signed off Mr Noble as being able to operate BCL's balloons alone while carrying passengers.

[5] Mr Oakley left New Zealand on 26 November 2015.

[6] On 28 November 2015, Mr Noble was operating a flight when he flew low over a pig-breeding farm. There was some panic amongst the pigs. Some were injured when they panicked and one died. In their panic, the pigs damaged fences.

[7] On 2 December 2015, Mr Noble sent an email informing the Oakleys that he intended to take some time off. He did not say how many days he would take off. He left his usual accommodation that day.

[8] Because of the pig farm incident and the 2 December 2015 email, Mr Oakley suspended Mr Noble from flying. BCL invited Mr Noble to a meeting, which was held on 7 December 2015. On 9 December 2015, BCL terminated Mr Noble's engagement with immediate effect.

[9] On 15 December 2015, Mr Noble raised an unjustified dismissal grievance with BCL. The parties attended mediation in March 2016 but were unable to resolve the matters.

[10] On 19 April 2017, Mr Noble lodged his first application in the Authority.

Mr Noble's claims

[11] Mr Noble's principal claim is that BCL unjustifiably dismissed him. He claims unpaid wage arrears of \$1,000 per week plus \$400 per flight undertaken. He also claims \$25 per hour for work he did over and above his flying duties. He claims reimbursement for the added cost to him of having to rearrange his return flight to the United States.

[12] Mr Noble has withdrawn his claim for a reimbursement for accommodation expenses. That is because he did not personally incur any ongoing accommodation expenses once BCL terminated his position.

[13] He initially claimed penalties for the lack of a written employment agreement and BCL's failure to provide him with a safe workplace. The penalty claims were out of time and were not pursued. The allegation of lack of a safe workplace is maintained as part of Mr Noble's evidence insofar as it contributes to his explanation for sending the 2 December 2015 email.

BCL's response and counterclaim

[14] BCL denies all Mr Noble's claims. BCL says Mr Noble was an independent contractor and not an employee, therefore the Authority has no jurisdiction.

[15] BCL's original statement in reply, on 31 May 2017, did not raise any counterclaim. However, in September 2017, it lodged a counterclaim and on 16 October 2017, it lodged a statement of problem containing an amended counterclaim.

[16] BCL counterclaims that, if Mr Noble is found to have been an employee, he breached terms of his employment agreement by flying in a prohibited zone and failing to carry out his duties with proper skill and care. Part of the claim of failing to use proper skill and care relates to Mr Noble making himself unavailable without notice on 2 December 2015.

[17] Because of those breaches, BCL says Mr Noble caused it to lose \$23,330.16. That consists of \$5,474.50 for veterinary and other costs paid to the pig farmer, and loss of income/profit from balloon flights not able to progress without Mr Noble as a pilot.

Mr Noble's response to the counterclaim

[18] Mr Noble claims that the Authority has no jurisdiction to consider and determine BCL's claims because they are claims in tort. He asks for the counterclaims to be struck out. In addition, he denies he breached any terms of his contract with BCL. He says there was no prohibited zone and that he carried out his duties with proper care and skill.

Preliminary issue

[19] There is a preliminary jurisdictional issue to be resolved. Mr Noble asserts that he was an employee. BCL says that he was not, but was an independent contractor. If BCL is correct, the Authority has no jurisdiction to consider either Mr Noble's claims or BCL's counterclaim. I cannot consider any other issues that I may need to determine until after I have determined whether the Authority has jurisdiction.

[20] In a case management conference, I raised the issue of whether the Authority had jurisdiction based on my reading of documents supplied by the parties prior to the case management conference. Mr Noble's counsel submits that the fact that BCL did not question whether Mr Noble was an employee either in mediation, in its initial statement in reply or at any time before I raised the question is evidence that it must have considered him an employee. However, jurisdiction is not established simply because the parties agree that there is jurisdiction. It is important to note that how the parties describe the relationship is not determinative of whether Mr Noble, based on the real nature of the relationship, was an employee. Whether he was an employee relies on a legal test or tests, based on the real nature of the relationship, that the Authority has to be satisfied are met before the Authority has jurisdiction.

[21] Prior to the investigation meeting, I indicated to the parties that it might be possible for me to issue a determination on this jurisdictional issue, and on the application to strike out the counterclaims, after hearing some evidence but prior to hearing all the evidence. I gave that indication hoping that I could save the parties time and money. However, given the short duration of the employment relationship and the number of disputed facts it was not possible for me to do that. Likewise, it was not possible for me to make a preliminary determination on Mr Noble's strike out application.

[22] I heard sworn or affirmed evidence from Mr Noble, Mr and Mrs Oakley, Martyn Stacey, Andrew Shelley, Regan Dalley and John Crawford, who all provided witness statements prior to the investigation meeting. I also heard affirmed evidence from Andrew Nicholson, who was summoned to give evidence. I questioned all the witnesses, and both counsel had an opportunity to question them.

[23] I received written and oral submissions from counsel.

History of engagement

The medical examination

[24] Before Mr Noble left the US, BCL sent him an email suggesting a particular doctor would have capacity to conduct his medical assessment as soon as he arrived in Christchurch. Mr Noble responded that he had already made an appointment with another doctor. Mr Noble had his medical examination on 4 or 5 November 2015. Because of his age, he had to be examined by a cardiologist. Mr Noble was told that he had passed the medical examination. However, the doctor had to send a report to the CAA for its approval and records before Mr Noble could be certified fit to fly. Apparently, the cardiologist mislaid the report, or it was lost in transit. It did not arrive promptly with the CAA.

The car

[25] On 6 November 2015, Mr Nicholson drove Mr Noble to BCL's premises to meet the Oakleys and to pick up the car BCL supplied to him.

Training

[26] On 7 November 2015, Mr Noble went on a familiarisation flight with Mr Oakley, to get a feel for the operation.

[27] On 9 November 2015, Mr Noble flew one of Ballooning Canterbury's large balloons with Mr Oakley crewing, in preparation for Mr Noble's BFR. Mr Oakley says that he was disappointed with Mr Noble's performance. However, he put what he considered Mr Noble's poor performance down to "him not being current. As with all the flights I did with him we had a good debrief after this flight."

[28] Mr Noble denies that there were any problems with his performance that day and says that Mr Oakley told him it was an excellent flight. He says there was no debrief.

[29] After 9 November, Mr Noble flew as a passenger with Mr Oakley on a number of occasions while waiting for his medical clearance to come through.

[30] Also over that period, Mr Oakley took Mr Noble through BCL's manuals that made up its exposition approved by the CAA. Mr Noble also took copies of the exposition home and Mr Oakley encouraged him to read them.

The maps

[31] The parties agree that Mr Oakley showed Mr Noble two types of maps. One was a current Airways map and the other was a BCL map of the area that it flies over. The map showed BCL's launch sites and their most recommended and used landing areas.

[32] Mr Oakley says he discussed those maps with Mr Noble and, in particular, talked about how BCL tries to keep its operation between the Waimakariri and Rakaia rivers, where it is best to launch from in particular weather conditions to avoid crossing those rivers and flying so to land at the recommended landing sites.

[33] Mr Noble says that Mr Oakley did not point out the location of the pig farm on the map. Mr Oakley says that he did. They agree that the pig farm was not marked on the map. There was no prohibited zone marked on the map.

[34] Mr Oakley says he also pointed out where the high-tension power lines were, which Mr Noble marked on the map himself. Mr Noble disagrees that Mr Oakley pointed out the high-tension power lines and says that he sourced a map for himself and then marked those high-tension power lines on the map that Mr Oakley had given him.

Completion of the BFR

[35] Mr Noble completed his BFR on 10 November 2015. BCL provided the balloon, LPG and crew for the test. However, he was still waiting on his medical clearance from the CAA so could not begin piloting balloons that were carrying passengers.

Training continued - the 13 November contested flight

[36] Mr Noble says that on 13 November 2015, he took a flight with Mr Oakley and was extremely concerned because the flight climbed through cloud and flew for half an hour over that cloud, which is very dangerous and in breach of CAA rules.

[37] Mr Oakley denies that there was any problem with the cloud or that he inappropriately flew above the cloud on 13 November.

[38] In fact, Mr Oakley points instead to a different day being 7 November 2015, the first commercial flight that Mr Noble took part in with Mr Oakley. That day, Mr Oakley says that he delayed launching the balloon three times. He says that as part of testing Mr Noble's suitability as a pilot he asked him at three different times whether he would launch if he was the pilot. For example, Mr Oakley says he pointed out that there were trees five kilometres away that were not visible at the time. He also said that there was no blue sky directly above them. Mr Oakley says that he was disappointed at Mr Noble's eagerness to get in the air under those conditions.

[39] Mr Oakley says they launched the balloon and climbed up through a hole in the clouds into the blue sky, they did not climb particularly high because of the strong westerly wind. He agrees that they did fly close to the top of the cloud and therefore the holes in the cloud cover were difficult to see. However, he says they only flew over cloud cover, with holes, for eight and a half minutes. He agrees that after the flight he and Mr Noble had a debrief and talked specifically about the cloud cover and weather conditions in relation to the flying. Mr Oakley says that during the debrief he expressed that it was not an ideal situation to be in and that he would not have chosen to launch again. He says he emphasised to Mr Noble that that should not happen again.

[40] Mr Noble denies that that discussion ever happened. He also says he was so unhappy about Mr Oakley putting him and the passengers in a dangerous situation through flying over cloud he tried to contact a CAA staff member he knew to talk it over. However, he did not report the flight at that stage.

Additional, non-pilot work

[41] On 17 November 2015, Mr Noble helped Mr Oakley and Mr Nicholson undertake annual checks and maintenance for two of the larger balloons. That work was outside of his duties as a pilot and so falls into the category of being paid at \$25 per hour.

Medical certification received

[42] On 19 November 2015, Mr Noble obtained his medical certification from the CAA. Earlier in that day, he had crewed for Mr Oakley for three hours in one of the small balloons.

Further training

[43] On 21 November 2015, Mr Noble flew one of the large balloons with Mr Oakley crewing.

Sign-off and first date Mr Noble could pilot balloons alone for BCL

[44] By 22 November 2015, Mr Noble had finished his BFR and was fully qualified to be a commercial hot balloon pilot in New Zealand. He had also returned a negative drug and alcohol test. Mr Oakley and Mr Noble worked together on 22 November 2015 and Mr Noble and Mr Oakley signed the essential documents in relation to the exposition. It was only after that, that he was qualified and able to begin duties as a pilot in charge of a balloon for BCL.

Further training

[45] On 23 November 2015, Mr Noble piloted one of the small balloons on his own and on 25 November, he co-piloted one of the hot air balloons with Mr Oakley. Mr Noble also completed his first aid course that day.

[46] On 26 November 2015, Mr Oakley and Mr Noble co-piloted one of the larger balloons. Later that day Mr Oakley flew to Australia as he had intended to do to crew for the Oakley's son who was competing in the junior world gliding championships.

The pig farm flight

[47] On 28 November 2015, Mr Noble completed his first commercial flight without Mr Oakley. Early on in the flight, Mr Noble was looking for somewhere suitable to land. Unfortunately, he apparently inadvertently flew low over the pig farm, which he had been told he should not fly over.

[48] Mr Noble says that he was never told that the pig farm was a prohibited zone. He acknowledges that he was told he should not fly over it, but he says that he was never adequately shown the actual location of the pig farm. He says it should have been marked on one of the maps that he was given and it was not. He says that he was unaware exactly where the pig farm was when he went up in the balloon on 28 November 2015.

[49] He also says that Mr Oakley had never satisfactorily pointed it out to him from the air and that although he asked a crewmember once that person did not tell him where it was. That crewmember denies Mr Noble asked him.

[50] Mr Oakley denies that and says he pointed it out a number of times and verbally checked that Mr Noble understood where it was. Mr Noble assured him he did know.

After the pig farm flight

[51] The first that Mr or Mrs Oakley knew there had been an incident over the pig farm was when the owner of the pig farm tried to call Mr Oakley in Australia. He was unable to speak directly to Mr Oakley. The first notification Mrs Oakley got was via a Facebook Messenger message from Mr Oakley indicating that the pig farm owner was trying to call him. Then the pig farm owner rang Mrs Oakley.

[52] Mrs Oakley went out into the yard and saw Mr Noble refuelling the balloon. She asked him about where he had flown and told him she had had a call from the pig farm owner about his distressed pigs. Mr Noble says that he acknowledged that he had flown over the farm.

[53] He told Mrs Oakley that he was up high and that winds were getting quite strong so he had made the decision to come down. He was down quite low when he saw the pig farm and so used the whisper burner to gain height hoping it was enough to get over the farm without having to burn again. However, he told her that about three-quarters of the way over the farm the balloon was cooling and starting to descend too quickly so he had to use the whisper burners again. He said that he saw the pigs and thought most of them were okay although they were gathered in one corner and he had seen one go through a fence.

[54] Also on Mr Oakley's advice, Mrs Oakley rang Mr Noble, who by that time was back at his accommodation asking him to write a full report on the flight and to do it as soon as possible while it was fresh in his memory.

[55] Mrs Oakley says that later that same morning Mr Noble telephoned her again and suggested that she might want to collect the Flytec recorder from the relevant balloon and delete the flight. She says she understood him to say that because that

would get rid of any incriminating evidence that could be used against him. Mrs Oakley said she refused to do that.

[56] Mr Noble agrees that at some point he did speak to Mrs Oakley about the Flytec recorder. He says that that was not on the phone but quite soon after the flight when Mrs Oakley asked him where the recorder was. He told her it was in the shed and she went to collect it and took it away. Mr Noble admits that he suggested that it might be better if the Flytec recorder got a flat battery. He admits that he suggested a flat battery so the data could be deleted and they could pretend that the Flytec recorder had not been operating during his flight. He says he merely made the suggestion to protect the company in case the CAA became involved. He says that he knew his flight was:

totally legal and safe in every way and that the log recorder would prove this to be so. I never said that she should lose the recorder or destroy it.

[57] There was no flight on 29 November. However, Mr Oakley sent Mr Noble an email stating that he had tried ringing him but he had been having problems with the phones where he was. He told Mr Noble that he needed his report ASAP. He wrote:

This very important (sic) for accuracy and to work out what needs to be done so this doesn't happen again. What has happened could have serious consequences for our business so it is important I get your facts from take off to landing including what you saw the Pi ball do prior to launch. I have had eye witness accounts and now need your report.

[58] Mr Noble conducted a flight on 30 November. Later that day, Mr Noble emailed Mr Oakley his report of the 28 November flight.

[59] In response to Mr Noble's report, later on 30 November 2015, Mr Oakley emailed Mr Noble back:

Advice on interim report. No launch should be done from Colgate in a NE to Northerly direction unless you have a westerly over the top. Remember we are target flying towards home, Griggs or Greendale. Or in a southerly just North to NE of Darfield. Please reply so I know you have received this.

The cancelled 1 December flight

[60] On the night of 30 November, Mr Noble checked the weather between 7.00 and 7.30 pm, as he was required to do, to decide whether a flight should proceed the following morning or not. He also checked the weather between 2 and 2.30 am. He decided that the weather indicated that it would be safe and suitable for flying in the morning.

[61] However, at 3.30 am Mrs Oakley telephoned Mr Noble and told him what the weather conditions were at BCL's headquarters and yard. She suggested to Mr Noble that Mr Oakley would not fly in such weather conditions. Mr Noble decided to call off the flight. Therefore, the passengers and crew were given late notice that the flight was cancelled.

[62] On 1 December, Mr Oakley emailed Mr Noble:

Could you please put on flight check the direction of breeze on the ground at take-off.

If you are going to make a decision on flying it needs to be made by 3 a.m. so we can let passengers and staff know. The ATIS is only a guide as ChCh can be very different to Hororata. The wind is not a problem because we have that info from our wx stations but cloud can be in a NE. If unsure about cloud cover and height at DRF give Britta a call on her cell. Cloud can roll in later but it usually clears after sun-up increasing wind and temp...so get up check winds and dew point across the plains. Look outside for cloud if still unsure make a ph call. This will not happen often... passengers and crew will get pissed off with late and indecisive calls repeatedly. It doesn't happen often but with better understanding and by reading the right wx information you can make more accurate calls on time.

I will email it around 7 p.m. NZ time with my wx thoughts on tomorrow if that helps.

[63] Mr Noble responded that he would put the wind direction and speed on the load sheet. He wrote:

I normally make a decision by about 7.30 p.m. and if there is a cancellation I start calling about 2.30 a.m.

This morning was only cancelled after Kate called me but later on looking at the Springfield Skycam and wind I could have flown. I am getting a better grip on the local conditions but if you have time your thoughts would be helpful.

[64] In the evening of 1 December, Mr Oakley wrote an email to Mr Noble with an update on his view of what the weather conditions would be for the following morning. He suggested it might clear for a 5.50 a.m. launch if that launch was over by the river at Darfield. He told Mr Noble he would need to look at the rain radar and track its progress and work out if it will clear in time.

[65] Mr Oakley wrote that, in those same circumstances, he had delayed a decision to meet by an hour if there were only a small number of passengers and they were flexible but could not fly the day after that. He suggested that Mr Noble needed to keep everyone informed including the crew and Mrs Oakley. He wrote:

Today Kate was right to ring you with weather update. The winds at home were gusting twice the average and we had low cloud and moisture in the air. It did not clear until after 7.30 – 8.00 and then the wind was gusting over 26 k on the ground.

[66] In fact, Mr Noble was very angry about what he saw as Mrs Oakley's interference in his domain as the pilot and a weather expert leading to the flight being called off on 1 December.

Correspondence between Mr Noble and Mrs Oakley about payment and tax

[67] On 29 November, Mrs Oakley emailed Mr Noble asking for his IRD number and PAYE code to work out his "wages".

[68] Mr Noble replied that he had not had an IRD number since before 1990, and:

Usually I get paid as a contractor, then sort out my own tax
Let me know how you would prefer to do things.

[69] Mr Noble told me that until then he had expected all payments to be paid to him in full with no tax deducted. He and Mr Oakley agree they had not discussed the tax situation when discussion payment. He says that Mrs Oakley's email was the first indication he had that BCL might take tax off what he would be paid. He told me that he does not pay tax in the US, unless he earns over US \$96,000.

[70] On 1 December, Mrs Oakley replied that was:

...OK. Can you give me your GST number and I will write up receipts for GST purposes at your end and so our accountant knows what the payments were for. I also need your GST number so I can claim the GST back on the business.

[71] Later that same day Mrs Oakley emailed that she had spoken to BCL's accountant who told her there were three options. The first option was to treat him as an employee. Once she had an IRD number and a tax code, she would have to deduct PAYE from his wages.

[72] The second option was that he was a contractor with a GST number. He would invoice BCL for his work and she would add 15% GST to the invoiced amount.

[73] The third option was that he was a non-resident contractor. He would need to complete a non-resident tax return when he finished. She would still need to deduct tax and pay it to the IRD. He would need a NZ IRD number. However, if he gave her an IRD number and had a Certificate of Exemption she would only need to deduct 15% withholding tax off the amount he invoiced her. Otherwise, she would have to deduct 30% so it would be to his advantage to get a Certificate of Exemption.

The 2 December email

[74] There was no flight on 2 December, but whether that was because of weather or passenger numbers I am not certain. At 1.50 p.m. that day, Mr Noble sent the following email to Mr Oakley:

I very rarely make late and indecisive calls. Kate wasn't just giving a weather update she strongly suggested that you would not fly in these conditions and that is why I late cancelled. Besides checking the local weather stations and the Springfield Cam for the next few hours I drove up past Darfield at about the time I would have been landing and the wind was less than three knots on the ground. I concluded that my forecast was correct and I should have flown. I am aware that Up Up and Away lost one of its best pilots who went back to England because he did not want to be involved with Peter's wife Vanessa making pilot decisions on his behalf. There were also others around the same time that found having too many decision makers was enough to make them leave. I am very open to talking about the weather with other pilots and will sometimes contact people for an on the spot observation but the situation that occurred yesterday just causes a lot of unnecessary stress and complications.

Another problem that is causing me some stress is the non-adherence to the time and duty rules. I have spoken to a few contacts that did rosters for NZ airlines after they gave up flying and described to them exactly what we did. They could not believe what I had told them

and said that if CAA got wind of what was going on they would suspend the operating licence and prosecute the individuals involved.

Before writing the pig report I spoke with two legal type friends that I have known for a long time and explained what happened. Both advised me not to put anything in writing as it may be self-incriminating but as you know I did cooperate with you and make a report. Both of them also made comments about the fact that Kate wanted the Flytec record before it could be lost for various reasons and that her actions should have set off alarm bells or raised a red flag in my mind.

As you may understand I feel like taking a break for a few days but I also have to sort out being paid. Kate 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 being 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.

Mr Noble and Mrs Oakley's interaction after the email

[75] I am satisfied that Mr Noble had also talked to Mrs Oakley about his concerns about the flight and duty rules adherence. Mr Noble was concerned that if he had to make or receive phone calls after 7.30 pm he would not be getting the required number of hours free from duty required under the exposition by the CAA in order to be safe to fly the following morning.

[76] However, it was not entirely clear to Mrs Oakley exactly what Mr Noble's concerns were. Mrs Oakley received Mr Noble's 2 December email and spoke with Mr Oakley about it.

[77] She rang Mr Shelley and reported what she understood to be Mr Noble's concerns to him. BCL contracted Mr Shelley to prepare a written assessment of BCL's flight and duty scheme. He did so and provided an assessment that BCL's

exposition and its practice both demonstrated compliance with the CAA requirements and the exposition. He noted that there was “an extra buffer of 3.5 hours rest available to the pilot.”

[78] After Mr Noble received Mr Shelley’s report, he came to the Oakley’s house and wished to speak to Mrs Oakley about his concerns about the duty rules adherence. Mrs Oakley says he was aggressively insistent about coming inside and talking to her and demanded that she get Mr Shelley on the line, who had written BCL’s exposition and was BCL’s quality assurance officer. She says Mr Noble demanded to speak to Mr Shelley himself and threatened to report BCL to the CAA.

[79] Mrs Oakley refused to let Mr Noble inside and he eventually left. She was very shaken by the encounter. Mr Noble denies that he was aggressive or threatening.

Mr Noble and Mr Oakley’s telephone conversation

[80] After sending the email Mr Noble left his accommodation and went to stay with Mr Nicholson. Mr Oakley decided to try to contact Mr Noble at Mr Nicholson’s house. Although Mr Noble does not remember speaking to Mr Oakley in the evening of 2 December, I am satisfied that Mr Oakley telephoned Mr Noble. They had a discussion about Mr Noble’s email and Mr Oakley instructed Mr Noble that until he was able to come back to New Zealand Mr Noble should do no more flying.

[81] On 3 December, Mr Noble rang Mrs Oakley and asked if there was a flight the next day. He says that indicated that having had the brief break he needed he was now available for work again. Mrs Oakley told him there was no more flying until Mr Oakley got back from Australia. She also questioned him about his remarks in the email about her wanting the Flytec recorder before it could be “lost for various reasons”... “should have set off alarm bells or raised a red flag in my mind”.

The letter inviting Mr Noble to a meeting

[82] On 4 December, BCL emailed Mr Noble a letter. BCL wrote that it had a number of concerns about its ongoing relationship with him as a pilot. It asked him to attend a meeting the following day, or if that did not suit on 7 December:

The purpose of the meeting is to discuss the following issues:

1. The manner of payment and ongoing relationship in the form of an employee employer relationship or independent contractor and how payments and any deductions are to be made.
2. The flight of 28 November 2015 which ended up traversing over the property of ... who has sustained damage being in the form of causing the death of and injuries to his pigs. The vet report and photos have been emailed to you.
3. The communications between you and Ballooning Canterbury.com Limited in respect to the losing of the GPS log (that is, the inference that this log be deleted).
4. You advising Ballooning Canterbury.com Limited that you would not be available for duties without seeking agreement with us prior to you notifying us of your unavailability.
5. Other general communication issues regarding assessment of weather, passenger liaison, resting hours, clarification over rates and benefits.

We are of the view that these issues are serious and that it is important that we address these in a timely and thorough manner. Your cooperation and attendance is necessary. Because these are relatively significant issues you are able to bring a support person or legal representative to the meeting. Michael is returning to New Zealand and will be present at the meeting. All flying is suspended until these issues are sorted.

Mr Oakley's report of the 28 November flight

[83] At some point before the meeting, BCL had the flight data downloaded from the Flytec for the 28 November flight. Mr Oakley wrote a report on his findings. He reached a number of adverse conclusions about the flight and Mr Noble's ability as a pilot.

The meeting

[84] Mr Oakley got back to NZ on 6 December. On 7 December, the meeting took place between Mr Noble, Mr and Mrs Oakley and Garry Wakefield, BCL's solicitor. Mr Noble was not represented and did not have a support person.

[85] Mr Wakefield took some notes of the meeting. I accept they are not full minutes but I set out here the areas he noted were discussed.

- Mr Noble said he was not accurately told of the pig farm location and not given a map with it on. He also said he had not flown close to it on training flights. He said he was not totally aware of the pig farm.

- Mr Oakley disagreed and said he had pointed out the pig farm.
- Mr Noble mentioned honesty and said Mrs Oakley had given him a NOTOC (Notice to Crew) not to fly over the pig farm that was backdated.
- Mrs Oakley disagreed and said she wrote it and dated it the day she wrote it.
- Mr Noble and Mr Oakley discussed the speed and height of the flight over the pig farm. Mr Noble said that he had to burn and that he was not happy flying at the height he was over the pig farm.
- Mr Noble alleged BCL removed photos taken on the day he alleges Mr Oakley piloted a balloon above cloud from BCL's Facebook page, giving an incorrect perception.
- There was a discussion about the suggested "removal of batteries" and Mr Noble said he had no support from BCL "as to logs".
- In relation to payment, there was a discussion about the \$1,000 retainer and originally \$250 for the 120 balloon, and \$25 per hour for extra hours. "\$1,000 from BFR". However, there is no indication as to who said that and whether the other party agreed.
- Mr Noble said his ECG results were lost in the post and he spent days on the phone trying to sort out his BFR. He said he knew of 8 people who were paid as he expects to be paid.
- "\$1,000 per week when starting as employee". However, there is no indication as to who said that and whether the other party agreed.
- Re Part 115 – flight and duty hours - there was a discussion about a passenger ringing Mr Noble one night at 10.20 or 10.30 pm.
- Mr Noble said he had spoken to the CAA about Mrs Oakley's weather call. He said the issues related to his time because his sleep was interrupted.
- Mr Noble said re the flight above cloud that they needed "to address safety issues" and that he did not "like to push limits". He said in the past month he "helped him do it and felt very uneasy of flight over cloud". He left Up Up and Away.
- Mr Oakley said of that flight "both made decision & jointly made decision & back up & up in days (sic) would've done the flight".
- On the issue of Mrs Oakley's weather call and "take off advice", Mr Noble said he would not push the limits in marginal conditions. Mrs Oakley said she had never told him "he has to fly, never told he has to take off".

- Re his “unavailability for duty” Mr Noble said he was “never given any indication of duty calendar ... even other staff didn’t know”.
- Mr Oakley said he gave “no indication as to whether he was going to be back – no answer of cellphone”.
- Mr Noble advised “with 20-20 hindsight he should have acted differently”.
- The CAA was discussed.

[86] The parties agree there was no discussion about whether Mr Noble’s engagement was to continue. The Oakleys’ evidence is that they asked Mr Noble if he could see a way forward and said he could not, which led them to conclude they needed to end his engagement. Mr Noble is equally clear that he was not asked that and did not say he could see no way forward.

Mr Noble provides his IRD number and his tax code

[87] On 7 December, at 10.03 pm, Mr Noble sent his IRD number to Mrs Oakley.

[88] On 9 December 2015, at 3.03 pm, just 22 minutes before BCL sent the letter below, Mr Noble emailed Mrs Oakley his tax code of ‘M’, indicating that he wished to have PAYE deducted from his pay.

The letter ending the engagement

[89] On 9 December 2015 at 3.25 pm, BCL emailed Mr Noble a letter ending his engagement:

...

2. We note that yesterday you have provided us with your IRD number, however we are still awaiting notice from you as 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.

3. As you are aware, Ballooning Canterbury.com Ltd. (“BC Ltd”) is a new business venture that was started not long after the Christchurch earthquakes with only 5 paid casual employees outside of those associated with ownership.

4. We requested your attendance at the meeting in order to give you an opportunity to clarify and receive your explanation as to the concerns regarding your actions set out in our email to you of 04 December 2015. These issues being:

- a. the nature of our relationship;
 - b. the 28 November 2015 flight over the ... Pig Farm;
 - c. Communications relating to “losing” or deleting of the flight recorder log;
 - d. The manner of notifying unavailability for duties; and
 - e. General communication, weather determinations, passenger liaison, time and duty (resting hours) etc.
5. We also note your concerns regarding safety as being of paramount importance. This principle of the paramountcy of safety is likewise the foremost concern of BC Ltd its directors and administrator. While the concerns raised by you relation to time in duty and weather conditions to fly are duly noted, not all of your concerns are accepted by us. We consider that time in duty issues ought to have been discussed with us prior to you discussing these to third parties. This would have enabled any clarification (if needed) could be addressed by approaching he Part 115 Manual of Operations authors or a joint approach to the CAA for any changes to that process if considered necessary. It was, in our view, unhelpful.
6. However, the major concern of BC Ltd is the communications relating to the destruction or “losing” of the flight recorder log, which indicate issues relating to reliability. The manner of notifying unavailability for duties and difficulties surrounding the provision of tax number or unwillingness to supply Non-Resident Withholding tax certificate support these concerns.
7. After giving the matters 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.

[90] BCL either did not see that Mr Noble had provided his tax code before it emailed the letter or decided not to amend the letter after he provided his tax code.

[91] On 10 December, Mr Oakley returned to Australia. Mr Noble changed his flights and on 22 December he left NZ for the US.

Was Mr Noble an employee?

[92] Mr Noble bears the onus of establishing on the balance of probabilities that he was an employee. BCL says he was not an employee but was an independent contractor.

[93] Section 6 of the Employment Relations Act 2000 (the Act) defines an ‘employee’ as “any person of any age employed by an employer to do work for hire or reward under a contract of service”.

[94] In *Poulter v Antipodean Growers Limited*¹ the Employment Court summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson v Three Foot Six Ltd*² and earlier judicial decisions:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the fundamental test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question.

[95] In *Poulter*, the Court concluded that ultimately it is necessary to gain an overall impression of the underlying and true nature of the relationship between the parties.³

[96] The starting point is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental, or economic reality, tests.

¹ [2010] NZEmpC 77 at [20].

² [2005] ERNZ 372.

³ Ibid at [21].

Intention of the parties

[97] There is no written documentation, such as an employment agreement or a contract for services. Therefore, there is no document that demonstrates the parties' intentions at the beginning of the relationship.

[98] Indeed, only a few aspects of the arrangement were mutually agreed between BCL, who was represented at all times during negotiations by Mr Oakley, and Mr Noble. All negotiations took place by way of email or telephone discussion and at least one voicemail message, left by Mr Oakley. The first contact was from Mr Oakley by email on 1 July 2015, sounding out Mr Noble's interest and availability.

[99] Mr Oakley and Mr Noble discussed many aspects of the engagement prior to Mr Noble coming to New Zealand, and one or two aspects subsequently. I set out below the areas that were agreed, and those that are disputed:

- The engagement was for a fixed period from a date in early November 2015, BCL requested Mr Noble to arrive 1 November, originally wanting Mr Noble to start flying about 9 November. Mr Noble left the US on 1 November.
- The end of the engagement was to be in mid-January 2016. Mr Noble booked his return flight for 19 January 2016, which suited BCL.
- BCL would reimburse Mr Noble for his return airfares between the United States and Christchurch.
- BCL would provide Mr Noble's accommodation from the date he arrived in New Zealand and provide a car. The provided accommodation included breakfast⁴ and dinner.
- BCL would pay Mr Noble a retainer of \$1,000 per week. However, the starting date for that was apparently not agreed.
- BCL would pay \$400 each flight that Mr Noble piloted alone. However, there are different understandings about whether this amount was already encapsulated in the \$1,000 retainer. That is, whether Mr Noble would not receive any money over and above the \$1000 if he did not pilot, for example, at least three flights in the large balloon per week. BCL says only if he did that – e.g., \$400 per flight x 3 = \$1,200 - it would pay him \$200 over and

⁴ Although, at least on days he piloted flights, Mr Noble did not eat the breakfast. He kept breakfast food in his car and ate it on the way to BCL's premises.

above the retainer. However, Mr Noble's understanding was that he would be paid the \$1,000 retainer each week plus a 'bonus' of \$400 per flight in the big balloons. Therefore, if he undertook 3 such flights in one week BCL would pay him a total of \$2,200.

- Mr Noble was also interested in flying, and could be required to fly, the smaller balloons. There is differing evidence about how much payment Mr Noble agreed to receive for any small balloon flights. Was it \$200 or \$250 per flight?
- Before he could pilot any BCL balloons Mr Noble would have to receive medical clearance by way of a medical certificate to be provided to the Civil Aviation Authority (the CAA) after he arrived in New Zealand.
- In addition, Mr Noble had to pass the Bi-Annual Flight Review test (BFR) to be certified by the CAA as able to be the sole pilot on a commercial flight carrying passengers.
- BCL agreed to, and did, provide a balloon, crew and LPG for Mr Noble to get his flight hours "current" so he could sit his BFR. It also provided the balloon and LPG for him to sit that test.
- BCL would reimburse Mr Noble \$25 per hour for any work he did for it over and above his pilot duties. However, there is disagreement about what relationship the \$25 per hour bore to the \$1,000 retainer.
- Mr Noble was responsible for refuelling the balloons he piloted.
- BCL paid for a drug and alcohol test it required Mr Noble to take before he could start any pilot work. It also paid for him to gain a current first aid qualification.
- BCL supplied a uniform consisting of a BCL branded cap and fleecy jacket.

[100] There was no discussion between the parties about what kind of engagement Mr Noble's work would be before he arrived in New Zealand; that is, was he to be an employee or an independent contractor? There was no common intention about what Mr Noble's employment status would be in relation to New Zealand law. In the absence of any agreement about that, I need to analyse the whole of the rather short working relationship, the details of which I have set out above.

The control test

[101] The control test examines the extent to which BCL controlled the activities of Mr Noble.

[102] Mr Noble was the pilot. As such, he was the person in charge of the entire ballooning part of the operation from deciding whether to proceed with a flight in relation to the weather or making the decision to cancel it, making sure the balloon was safe to fly, selecting a launch site, deciding how long the flight would be and its path, selecting a landing site, landing the balloon, to refuelling it once the flight was over and preparing it for a further flight on subsequent days.

[103] Once Mr Oakley left New Zealand, he did retain some involvement but only in giving advice to Mr Noble about weather and flights. He could not make flying related decisions or order Mr Noble to make pilot decisions.

[104] Despite Mr Noble insisting that Mrs Oakley had instructed him to cancel the 1 December flight, I find that she did not do so nor did she have the authority to do so. Mr Noble decided to cancel the flight based on her advice but it was his decision to make.

[105] The amount of control a pilot has over all flying decisions is dictated by law; that is, by their duty to comply with all CAA regulations. BCL's exposition gives it CAA approval to conduct its operations. Any pilot, whether an employee or an independent contractor, is bound by CAA regulations and the operating business's exposition. Therefore, the issue of Mr Noble's personal ability to exercise control over flight operations does not help to establish whether he was an employee, or an independent contractor.

[106] BCL had control over the time by which flights would ideally be cancelled on the basis of Mr Noble's assessment of the weather. BCL also had control over whether a flight proceeded at all due to passenger numbers and whether passenger numbers dictated that Mr Noble should fly a small or a large balloon. However, I consider BCL's control over those things a neutral factor. That is because even if Mr Noble was an independent contractor, BCL would have retained control of decisions relating to the financial viability of flights for its business.

[107] BCL did expect to have control over Mr Noble and to require him to fly on all days that the weather was suitable, there were enough passengers and he could legally fly in line with the time and duty rules set out in its exposition. It demonstrated that by its level of concern about him indicating that he felt like taking a few days off, and not setting out how many days he was making himself unavailable.

[108] However, this does not necessarily favour an employer/employee relationship. Mr Noble was engaged for a fixed term in the busy season for the NZ industry and understood that, barring illness or other factors affecting his fitness to fly, he was required to be available for as many days as possible within the CAA/exposition requirements. That would have been the case equally for an independent contractor or an employee.

[109] Mr Noble was engaged solely as a pilot. He had the opportunity to agree to other work that would be paid at an hourly rate, but he did not have any obligation to perform such work and could not be directed to do so.

[110] Mr Noble unilaterally decided on 2 December to make himself unavailable for work for “a few days”. That tends to suggest that he did not consider he was under BCL’s control or direction.

The integration test

[111] The integration test examines the extent to which Mr Noble was integrated into BCL’s business. That is, whether the work undertaken by Mr Noble was integral to the business and whether Mr Noble had become part and parcel of the business.

[112] Once Mr Oakley was in Australia, Mr Noble’s work was crucial to the business. Mr Noble represented the business directly in all his interactions with passengers. For example, Mr Noble wore a BCL cap when he flew. He used BCL’s balloons and BCL’s LPG.

[113] Mr Noble was not involved in BCL’s administration of its business or any business decisions.

[114] I consider the integration test to be of little assistance in this case. Mr Noble’s duties could be carried out equally by an employee or an independent contractor.

Both types of worker would be representing BCL with passengers and both would be equally bound by BCL's exposition. In addition, Mr Noble was engaged for such a short time it is not possible to say he became part and parcel of BCL's operation.

Industry practice

[115] From the evidence I heard, there is no established practice in the ballooning industry. Pilots are often engaged as employees and are equally often engaged as contractors. Industry practice is not a helpful consideration in this case.

Fundamental test

[116] This test examines the extent to which Mr Noble took on risk in providing his services to BCL, including asking whether he was in business for himself.

[117] Mr Noble paid for his own medical assessment and his BFR test, which were necessary before he would be qualified to pilot commercial flights in New Zealand.

[118] Mr Noble did not supply any 'tools of the trade', but that does not necessarily make him more likely to have been an employee considering that pilots, whether employed or contracted, would not usually be expected to supply the balloons they are engaged to fly or to supply any associated equipment.

[119] I have considered the relevance of Mr Noble's airfares and accommodation being paid by BCL and BCL providing him a car. BCL's best hope for a fixed term pilot was to 'import' Mr Noble from the US. I consider they would have paid his fares and accommodation and given him a car whether he was an employee or not. They needed to do that to attract a pilot of the level of skill and experience they required.

The relevance of the retainer

[120] Mr Noble was paid a weekly "retainer" whether he was required to fly or not. That meant BCL guaranteed him a weekly minimum of \$1,000. Mr Noble was required to make himself available for work for BCL every day it needed him to fly, subject only to the limits of the weather, passenger demand and the Flight and Duty Scheme in BCL's exposition.⁵

⁵ Section 3.3 Flight and Duty Scheme, all pilots were expected to have "24 hrs free of duty at least once every 7 consecutive days."

[121] When Mr Noble was not required to undertake any flight for BCL on a particular day, he was, in theory at least, able to seek and undertake other work. Indeed, the exposition stated at 5.3:

All pilots are expected to be flying for other operators and conducting private flights. *All flight time and duty time across all other operators, and private flying time, should be accounted for by the pilot when assessing compliance with the [BCL] flight and duty limitations.*

[122] In fact, Mr Noble did not undertake any other flying work for other operators or do any private flying when he was engaged by BCL, from the time he was qualified to pilot commercial flights.

[123] I consider that to have been mainly the effect of the limited time Mr Noble was engaged for, the short time he intended to be in New Zealand and the effect of the requirement to be available at least 6 days out of 7 for BCL, if he was required to fly.

[124] I do not consider that the payment of a retainer tends to prove Mr Noble was an employee in all the circumstances of this case.

Mr Noble's tax position

[125] In itself, how the parties deal with tax is not determinative of the ultimate question of whether a worker was an employee. However, it is a useful factor to examine.

[126] Mr Noble's counsel submit that Mr Noble's supply of his IRD number, and of his 'M' tax code on 9 December are the final piece of evidence that Mr Noble was an employee. They submit that BCL taking PAYE off his pay and referring to it as "wages" when depositing it in his bank account shows that both parties considered Mr Noble to be an employee.

[127] Mr Noble was not registered for GST. Despite Mrs Oakley's advice to Mr Noble that he would have to be GST registered for her to treat him as a contractor, a self-employed person earning income in New Zealand is not required by the IRD to be registered for GST unless they earn over \$60,000 in one tax year. There was no prospect of Mr Noble earning \$60,000 in his engagement with BCL. Since Mr Noble lives in the US there was also no prospect of him earning \$60,000 or more in NZ in

the tax year ended 31 March 2016. Mr Noble was not required to be registered for GST.

[128] Mr Noble submits that his 2 December email is congruent with his position that he was always an employee and in that email he was merely seeking to renegotiate more favourable payment terms.

[129] I agree that in part of the email Mr Noble seeks to revisit his terms of engagement. He writes that he should have asked BCL to pay for his medical assessment and that he regretted agreeing to \$400 per flight, because he got paid \$440 per flight many years earlier when working for another ballooning operation. That does amount to attempting to renegotiate terms already agreed. However, the larger part of the email in relation to payment, relates to his view that BCL has no right to demand a GST number or even his IRD number before paying him what he owes him. He writes extensively about what he considers NZ airline industry practice for “contract” pilots.

[130] Mr Noble’s counsel submit that the email merely demonstrates Mr Noble did not agree to accept payment from BCL with tax already deducted and that he wanted to deal with the tax issue himself. They submit that did not mean he saw himself as an independent contractor as he was aware that he was an employee. I disagree. It is clear from Mr Noble’s 2 December email that he thought of himself as a contract pilot and was insistent that was how BCL should treat him, as far as payment was concerned.

[131] Mrs Oakley initially approached paying Mr Noble as if he was an employee. That is not determinative of the issue. Mrs Oakley did the payroll for crew members, who were casual employees. She was not involved in the negotiations about Mr Noble’s engagement. Mr Noble represented himself as a contract pilot to her after she first mentioned deducting PAYE. Therefore, she gave him other options for payment if he wanted to be a contractor.

[132] Prior to 9 December 2015, Mr Noble demonstrated that he did not wish to have PAYE or any kind of income tax deducted from his payment by BCL. Mr Noble says that even though he considered himself an employee, he did not want tax deducted by BCL. He says because Mr Oakley had not told him the \$1,000 and the

\$400 payments would be subject to tax, so BCL should not have been able to deduct tax.

[133] Near the very end of the relationship, Mr Noble provided his IRD number. He would have had to do that in order to be paid as an employee or as an independent contractor. That does not tend to prove that he was an employee.

[134] A mere 22 minutes before BCL terminated his engagement, Mr Noble sent Mrs Oakley his tax code, which meant that he had elected to have BCL deduct PAYE from his pay before he received it.

[135] I consider the provision of his 'M' code does not determine that Mr Noble was an employee. All it really demonstrates is that he was eager to be paid. Any other option was more complex for him and would have taken him more time to arrange.

[136] By that stage, Mr Noble had lost trust and confidence in BCL, perhaps as much or even more than BCL had in him. That was partly demonstrated by his unilateral decision on 2 December to make himself unavailable for work for a few days. The meeting on 7 December did not restore his confidence in BCL. My view is that Mr Noble sensed that the relationship was essentially over. Of course, that does not mean that he was not aggrieved when BCL terminated the relationship.

Conclusion

[137] Neither Mr Noble nor BCL felt the need to reduce their arrangement to writing or to define it as one of employment or independent contracting. That has made this matter more complex for both parties. However, standing back and assessing the true nature of the relationship overall I consider that Mr Noble was not an employee.

[138] As a result, Mr Noble's claims and BCL's counterclaims are dismissed, for lack of jurisdiction.

Costs

[139] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[140] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff for the first day is \$4,500, and \$3,500 for each subsequent day.

[141] If the parties cannot reach an agreement, the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority