New Zealand Employment Relations Authority Decisions

Robb v Awaroa Lodge (Christchurch) [2011] NZERA 611; [2011] NZERA Christchurch 130 (5 September 2011)

Last Updated: 28 September 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 130

5271965

BETWEEN

A N D

CHRISTOPHER MICHAEL
ROBB
Applicant

AWAROA LODGE Respondent

Member of Authority: Representatives:

Investigation Meeting

James Crichton

John Levenbach, Counsel for Applicant Alyn Higgins, Counsel for Respondent

16 April 2010 & 13 September 2010 at Nelson; 10
December 2010, 17 December 2010 & 16 February 2011
via telephone

Date of Determination:

5 September 2011

DETERMINATION OF THE AUTHORITY

Introduction

[1] The determination of this matter has been unreasonably delayed as a consequence of the devastating Christchurch earthquakes. The Authority's file remained in the Authority's former Christchurch offices after the 22 February 2011 earthquake and the file has not been available to the Authority since then. Through the good offices of the parties' counsel, it was possible to rebuild the file, at least to the extent of the documents filed and served by the parties, and the email exchanges between counsel and the Authority in preparation for the investigation meeting and the interview of subsequent witnesses.

[2] However, despite the valued assistance of counsel, it was impossible for the parties' representatives to replace the Authority Member's notes of the various parts of the investigation itself which the Authority Member discovered were not entirely in his current notebook but in the previous volume which remained in the office. Because of the absence of that material information, it has not been possible for the Authority to complete its determination of this matter until access to those notes became available as a consequence of the efforts of the Department of Labour staff who accessed the Authority's former Christchurch offices by agreement with the Christchurch Earthquake Reconstruction Authority in the week

commencing 18 July

2011.

[3] The Authority can only apologise to the parties for the delay which of course was not caused by any default of the Authority itself or indeed of the parties' representatives who have done everything they reasonably could to facilitate the Authority's investigation.

Employment relationship problem

[4] The applicant (Mr Robb) alleges that he was unjustifiably dismissed from his position as a gardener/handyman on 31 January 2009 and that he was unjustifiably dismissed again on 8 March 2009 from a second and subsequent position as a cleaner working for the same employer (Awaroa).

[5] Awaroa maintains that Mr Robb was not dismissed on either occasion. Its position is that he was employed originally as a gardener on a fixed term employment agreement and that when that role came to an end he subsequently entered into a contractual role not being an employment relationship.

[6] Mr Robb was previously employed by the former owner of Awaroa Lodge and when the respondent took possession of the business, Mr Robb says that Awaroa promised to continue employing him on the same terms and conditions. In particular, he indicated that a specific undertaking was made that all his food and accommodation costs would be met by Awaroa although that promise was not made good.

[7] There was an individual employment agreement drafted and provided to Mr Robb which identified his role as *"gardener and maintenance helper"* and identified the employment as being subject to a fixed term from September 2008 down to 1 April 2009.

[8] For the avoidance of doubt, I refer to this document throughout the determination as the first agreement. Although submitted to Mr Robb for signature, his evidence is that he never signed the first agreement because *"by not signing it, I thought I was not accepting it".* Mr Robb told me that so far as he was concerned, the terms and conditions of his employment were *"the same terms and conditions I had worked under previously"* and in that respect, he relied both on the advice of the previous owner of the lodge, Mr Allan James Forsdick, together with the advices of Mr Barry Walters, a director of Awaroa who, according to Mr Robb, told him his position would be full time and permanent.

[9] Then, a second individual employment agreement was prepared for Mr Robb, this time referring to his role as gardener/handyman and this one for the fixed term period commencing 4 September 2008 and terminating on 1 May 2009. Mr Robb thought that this second agreement (which he also did not sign) was supposed to replace the first agreement. Again, Mr Robb's evidence is that he thought, in refusing to sign the second agreement, he was not accepting its terms and was continuing in his full time employment on the terms and conditions he had worked under previously.

[10] Then, in the spring of 2008, perhaps around late October of that year, Mr Robb deposes that he was asked by Salina Walters for Awaroa to help construct a new pizza area which Awaroa proposed to develop for its guests.

[11] Mr Robb agreed to this proposal and his evidence is that, as a consequence of the agreement between himself and Awaroa, the terms and conditions of his employment *"were changed verbally by Salina Walters"* and he then spent more time working on the building of the pizza area than he did in the garden. However, Mr Robb notes that the pizza area was adjacent to the vegetable garden and so he was able to *"oversee"* the garden while he was still involved in the adjoining construction work.

[12] Mr Robb says that Salina Walters then asked him to manage the pizza area and he did this for about two months. Ms Walters apparently promised that Mr Robb would be provided with *"a full time helper in the garden"* because of his responsibilities elsewhere, but this full time helper never eventuated. As a consequence, the gardens started to get overgrown. There were then complaints from Salina and Barry Walters to Mr Robb about the state of the gardens.

[13] Discussions initiated by Mr Robb in an attempt to get reimbursement of food and accommodation costs ended in recriminations and name-calling between the Walters on the one hand and Mr Robb on the other, and on 31 January 2009, Mr Robb was given a letter of that date making his position redundant. On 13 February 2009, Awaroa Lodge posted an electronic advertisement for an organic gardener on a website. Mr Robb maintained that the advertised position was in fact his role.

[14] Mr Robb returned to Awaroa Lodge on 2 February 2009 and was told by Barry and Salina Walters that he and his partner, Donna Lee, could *"stay and do the cleaning"* . Awaroa Lodge's position is that Mr Robb was taking over the cleaning contract and that that meant what it said, namely that he was a contractor to Awaroa Lodge and not an employee as he (Mr Robb) maintained.

[15] Mr Robb maintained in his evidence that he was relatively naive and *"effectively I believed that I was employed by Awaroa*

Lodge Limited as a cleaning manager" . Mr Robb thought that the contract he was signing was a labour-only contract *"as I never charged GST and was never a registered company. I then understood that as I was an individual I remained an employee of Awaroa Lodge Limited"* .

[16] That contractual arrangement, whether employment or not, came to an abrupt end on 10 or 11 March 2009 when Donna Lee, Mr Robb's partner, covered over one of the security cameras in the staff dining room. Mr Walters approached Mr Robb about two hours after this happened, and indicated that Mr Robb and his partner had to *"get off the property by 6pm that night"* and that he was *"cancelling the cleaning contract"* . At 7pm that evening, Mr Robb and his partner were presented with Trespass Act notices by an agent of Awaroa Lodge and were told that unless Mr Robb and his partner committed to not taking Court proceedings against Awaroa Lodge, they would not be paid for their last week's work. An inducement of $2,500 was also offered on top of the unpaid "wages" if no Court proceedings were taken. That offer was rejected by Mr Robb and the dispute between the parties proceeded to the Authority in the normal way.

Issues

[17] As will be evident from the foregoing summary, Mr Robb raises an employment relationship problem effectively in two parts, the first relating to an alleged unjustified dismissal for redundancy from his initial position as a gardener and the second relates to Mr Robb's claims concerning his status while performing cleaning duties at Awaroa Lodge. In the latter respect, the Authority's first task must be to establish whether there was an employment relationship or not. Plainly, if the Authority's conclusion is that there was no employment relationship, then the Authority has no jurisdiction to take matters further.

[18] Similarly, in relation to the first period in dispute, which undoubtedly involves an employment relationship, there are two separate employment agreements, each of which needs to be examined to identify what part it plays in Mr Robb's claims.

[19] Accordingly, it will be convenient for the Authority to consider the following questions:

(a) What is the relationship, if any, between the two short term employment agreements?
(b) Was Mr Robb unjustifiably dismissed as a gardener?
(c) Was Mr Robb a contractor or an employee for the cleaning work?

(d) If Mr Robb was an employee for the cleaning work, was he unjustifiably dismissed from it?

What was the relationship, if any, between the two gardening agreements?

[20] It is common ground that Mr Robb was asked to execute two separate employment agreements relating broadly to his gardening duties. Again by common consent, the first of these agreements defines the role as gardener and maintenance helper, was executed on behalf of Awaroa Lodge on 22 December 2008 and contemplates a fixed term engagement from September 2008 with an expected end date of 1 April 2009, although this is qualified by the terms of the following provision: *"This date may be extended if mutually agreed upon by both parties".* As I noted earlier, Mr Robb did not sign this agreement.

[21] The second agreement describes Mr Robb's role as "gardener/handyman" and identifies the fixed term engagement to be for the period from 4 September 2008 down to 1 May 2009. This second agreement is not signed by either party although the letter of offer with the second agreement is signed by Mr Walters for Awaroa Lodge.

[22] The two agreements are in substantially similar terms save for the description of Mr Robb's role, the duties required of that role and the remuneration. In the first agreement, Mr Robb is entitled to a salary of $40,000 per annum while in the second he is to be paid an hourly rate of $16 for a 40 hour week. Assuming no overtime was payable in respect of the second agreement, the effect of the change from the first agreement to the second is to reduce Mr Robb's annualised income from $40,000 per annum to $33,280 per annum. However, Mr Robb claims that during the period that he was building the pizza area, he was doing huge hours, he claims between 140 and 160 hours per fortnight (para.40 brief of evidence). However, the hours worked were, according to Mr Robb, of no consequence because he was paid a salary from the point that he became involved in constructing the pizza area.

[23] Nobody could offer me any sensible explanation as to why there were two employment agreements covering Mr Robb's employment, particularly when each of them is said to apply for the period from September 2008 down to 1 April 2009. The nearest to an explanation was Mr Walters' evidence that the second agreement was issued by Ms Kate Murray, who became responsible for human resources at Awaroa Lodge from the end of November 2008.

[24] The Authority needs to determine whether either of these agreements governed the employment of Mr Robb and, if so, for what period of time. As I have already noted, the agreements are substantially similar save for the fact that they refer to different roles with a different job description in each case (albeit with some common elements) and, more importantly, have an entirely different remuneration structure. What is particularly challenging in determining the issue is that, with the exception of the final month that only the second agreement applies to, both agreements cover the same chronological period. A further imponderable is that the second agreement was not signed by either party and the first agreement was only

signed on behalf of the employer. Mr Robb gave clear evidence that he was quite deliberate in not signing either agreement because he told me that he thought in not signing it, he was not accepting its terms and his reason for not accepting its terms in either case was that both of the agreements proposed by Awaroa Lodge were fixed term agreements and Mr Robb thought he was being employed on an open-ended basis. He thought that, as I have already noted, because he had been told that by the previous owner and had also had it confirmed to him by a co-worker, Mr Hill, who gave evidence to the Authority and who was clear that he had been told by Mr Walters that both his position (Mr Hill's) and Mr Robb's were permanent full time roles. Interestingly, Mr Robb's own counsel's submissions on the point suggest that Mr Robb signed the second agreement; he did not and he made it quite clear to me in his evidence that his reason for not signing that agreement was exactly the same as his reason for not signing the first, namely that it did not provide for his understanding of the employment agreement that had been reached between the parties.

[25] In the face of the clearest evidence from Mr Robb that the two fixed term agreements he was presented with did not accord with his understanding of the bargain between himself and the employer, it is difficult to conclude that either of the purported fixed term agreements contained the terms of the employment.

[26] In s.66 of the Employment Relations Act 2000 (the Act), Parliament has enacted a code for dealing with fixed term agreements and in particular providing clear rules governing when such agreements will be upheld. In essence, because the effect of a fixed term agreement is to abrogate or potentially abrogate the normal protections available to employees, the implementation of fixed term agreements must of necessity follow strict rules. I am satisfied in the present case that it would be unfair and unjust to hold that Awaroa Lodge can rely on either of these proposed fixed term agreements. The essence of the statutory provision is to require agreement between the parties and to provide for a fixed term engagement only for proper purposes approved by the statute. Without even considering whether the purposes proposed by Awaroa Lodge were proper or not, the fact is that there was no agreement between the parties. On the evidence before the Authority, Mr Robb was vociferously opposed to the suggestion that he was employed on a fixed term and as a matter of fact he did not sign either employment agreement. I hold that he was not bound by either employment agreement and it follows that his employment was an ordinary open-ended one.

Was Mr Robb unjustifiably dismissed as a gardener?

[27] By letter dated 31 January 2009, Mr Robb was advised by Awaroa Lodge that his *"... position as gardener at Awaroa Lodge has become excess to our requirements and therefore we have no alternative but to make this position redundant as at 31/01/09".* Mr Robb says that he was given that information verbally by Salina Walters when he alleges that she shouted at him *"you are the gardener"* and *"you are no longer required"* and *"you are redundant"* . Mr Robb told me in his oral evidence that he asked for written confirmation of the redundancy and did not get the letter dated 31 January 2009 until *"two or three weeks later"* .

[28] Mr Walters' evidence for Awaroa Lodge is that Awaroa Lodge went through a consultation process with Mr Robb under the guidance of a consultant they had engaged, Ken Harris. Mr Walters, in his brief of evidence, has this to say on the point:

Ken [Mr Harris] *was engaged by the Lodge to consult with Chris* [Mr Walters] *about his role at the Lodge ... Chris was advised that if the gardening role was to be redundant that his services could be useful as we needed to replace our housekeeping contract.*

[29] That evidence suggests that Awaroa Lodge relied on Mr Harris to conduct the consultation process with Mr Robb. But the problem with that contention is that Mr Robb flatly denies that there was any such consultation with Mr Harris, although he freely acknowledges he had a number of positive exchanges with Mr Harris with whom he had a good relationship. Mr Robb told me in his oral evidence:

I had spoken to Mr Harris on a couple of occasions prior to the redundancy but nothing about the redundancy itself until after it happened.

[30] Mr Robb's evidence on the point was quite clear and he was unshakeable on it.

[31] Furthermore, when the Authority was eventually able to talk to Mr Harris, he gave straightforward and credible evidence and while he remembers several telephone discussions and occasional face-to-face meetings with Mr Robb, Mr Harris was certainly unable to satisfy me that he had personally superintended the consultation process in respect of the redundancy situation. Mr Harris remembered giving advice to Mr and Ms Walters about what they needed to do in order to satisfy the legal requirements around consultation in a redundancy situation and that evidence of course is consistent with Mr Walters' own evidence. But Mr Harris quite properly conceded that he could not give evidence about what Mr or Ms Walters did with that advice because he was not physically there except on a very occasional basis.

[32] I do not think that Mr Walters' evidence that the consultation process was effectively "delegated" to Mr Harris is credible; it is inconsistent with Mr Robb's evidence which I much prefer and is even inconsistent with Mr Harris' own recollection of events. It follows from the foregoing conclusion that I am satisfied there was no proper consultation in respect of the redundancy. I think what happened was much as Mr Robb recollected it, namely that there was a shouting match between him and Ms Walters (something which, on the evidence before the Authority, was not uncommon) and at the conclusion of

that exchange, Mr Robb was told that he was redundant.

[33] Even if that is not what happened and Mr Robb was handed the 31 January 2009 letter of redundancy on that day, that letter itself confirms that the process adopted by Awaroa Lodge is not in conformity with the law because it simply announces that the redundancy would take effect from the date of the letter. There is simply no evidence before the Authority that there was any consultation in respect of Mr Robb's redundancy, and indeed all the evidence suggests that there was no consultation at all. Even some of the evidence from Awaroa Lodge itself (such as the letter of redundancy I have just referred to and Mr Harris' evidence) cast doubt on Mr Walters' claim that there was a proper consultation process. If Mr Walters' claim can be believed, it is difficult to understand why he would not himself have given evidence of the process of consultation and the involvement of the various people in it. Instead, what he did was, as it were, "delegate" the consultation to a consultant. But that consultant gave honest and straightforward evidence which did not confirm Mr Walters' claims.

[34] Mr Robb says that the precipitating event which brought about the termination of his employment was not, as Awaroa Lodge claims, a measured review of its requirements but rather an unhappiness about his performance and a sudden irritation about his claim to be reimbursed for food and lodgings. As to the former, Mr Robb's evidence is that in the spring of 2008 (Mr Robb thinks around late October of that year), Salina Walters asked Mr Robb if he would help construct a new pizza area which Awaroa Lodge sought to develop at its property. Mr Robb agreed and he told me in his oral evidence that the project took about two months to build and thereafter his evidence is that he was engaged in managing the pizza area as well. Mr Robb's evidence about the building of the pizza area is corroborated by the evidence of Lothar Winter who was the operations manager of Awaroa Lodge at the relevant time and by the evidence of Nathan Hill who was also involved with the building of the pizza area. The arrangement between Mr Robb and Salina Walters was that Mr Robb would continue to be responsible for the gardens and Mr Robb's evidence is that Ms Walters promised to get another worker to help him in the garden but this never eventuated. Given the time of the year, Mr Robb said that the gardens *"went wild"* while he was engaged in the pizza area work.

[35] Mr Walters' evidence is that Mr Robb never worked on the pizza area at all and that it was exclusively a project managed and run by a contractor of Awaroa Lodge, Mr Lee Day. Mr Day proved most elusive and it was difficult for the Authority to complete its investigation without speaking to Mr Day and for reasons which are still not clear to the Authority, Mr Day seemed most reluctant to give the Authority any evidence. An arrangement was made for Mr Day to give evidence on 17 December 2010 and Mr Day did not make himself available but he was eventually able to give his evidence on 16 February 2011 via a telephone link with the High Court at Auckland where Mr Day had been sworn in with the kind assistance of a Deputy Registrar at the Auckland Court.

[36] Mr Day confirmed that Mr Robb was engaged in assisting him to construct the pizza area and on Mr Day's recollection, Mr Robb would have been helping with the building of the structure on three to four days a week but not for a full span of hours. Mr Day thought that Mr Robb *"maybe worked 8am to 10am in the mornings and 3-5pm in the afternoons".*

[37] After some prodding, Mr Day disclosed that he and Mr and Ms Walters were close friends and that he had performed a number of contractual roles for the Walters and indeed had previously been engaged in a joint business venture with the Walters.

[38] Mr Robb's claim that he went on to manage the pizza area at the request of Awaroa Lodge is flatly rejected by Mr Walters; he identified another person as the manager. In any event, if the construction of the facility took the two months that Mr Robb said it took, that would take the construction period through until late December and the evidence is that on 3 January 2009, the Tasman District Council, the relevant local authority, visited the premises and closed the pizza area down because it did not have the requisite consents under the Building Act or the Resource Management Act. It was at the end of that same month, January 2009, that Mr Robb was made redundant and he says that the redundancy came about because Awaroa Lodge became more and more disgruntled about the untidy state of the gardens and his failure to produce quality produce from the gardens for use in the kitchens. He says that criticism is unfair because he was involved for so long in the pizza area project. Either way, he says that there was criticism of his performance in the gardens and that at least is confirmed by Mr Walters' evidence. Mr Walters says that Awaroa Lodge was unhappy about Mr Robb's performance.

[39] Mr Robb says the other reason that Awaroa Lodge decided to get rid of him from the gardening role was because he had sought to get reimbursement from Awaroa Lodge for board and lodgings costs. This was based on his contention that Mr Walters had agreed to reimburse him for his food and accommodation costs in a conversation which took place on or about 10 December 2008. Mr Robb says that he gave an invoice to Awaroa Lodge for reimbursement of his food and accommodation costs, based on that commitment he says was made by Mr Walters, and it was a discussion about that invoice which precipitated his dismissal for redundancy.

[40] In order to decide whether the redundancy was genuine or not, the Authority must look at all the circumstances leading up to the decision to disestablish the role and also look at whether in fact the role was, in truth, disestablished at all. As to that last point, Mr Robb calls in aid of his position an advertisement published in one of the websites which was placed electronically by Awaroa Lodge and which seeks *"an organic gardener"* . Mr Robb says that was his position. There is insufficient evidence before the Authority to reach a definitive conclusion about that claim. In particular, there are

insufficient details about the organic gardener role to enable the Authority to compare and contrast that role with Mr Robb's own position. But it does seem at least plausible that the electronic advertisement is an advertisement for Mr Robb's position.

[41] What is more, the aspects that Mr Robb refers to that he says precipitated his dismissal are also persuasive evidence for his view of the genuineness or otherwise of the redundancy. Despite Awaroa Lodge's attempt to couch the dismissal as a measured response to winter trading conditions, it is difficult to see why, if that were the motivation, the dismissal took place at the end of January, in effect high summer. Furthermore, I think Mr Robb is correct in his surmise that Awaroa Lodge was displeased about his performance as a gardener, notwithstanding the fact that, according to him, his involvement in the pizza area simply did not give him enough time to complete his gardening duties. Whether that is the explanation for his failure or not, it is clear that Awaroa Lodge was disgruntled about his performance. Mr Walters' evidence says so in so many words.

[42] Furthermore, I think the issue about the reimbursement of food and lodgings was also a precipitating event.

[43] For all these reasons then, I am not persuaded this was a genuine redundancy at all. I think that Awaroa Lodge became disgruntled about Mr Robb's performance as a gardener and whether it overlooked his involvement in the pizza area or thought it less significant than it actually was, is I think beside the point. The fact remains that it was displeased with his performance and the element of the disagreement about the reimbursement issue may also have played a part.

[44] But in the end, it seems to me, that if Awaroa Lodge was genuinely trying to shed costs for the winter months, making its gardener redundant in high summer was an inexplicable decision. Indeed, the only explanation for the decision is that it wished to rid itself of Mr Robb as a gardener and seek to recruit somebody else in his place.

[45] I conclude then that Mr Robb was unjustifiably dismissed from his position as a gardener and that the so-called redundancy was nothing more than a sham to enable Awaroa Lodge to rid itself of Mr Robb whose performance it had decided was unsatisfactory.

[46] One final matter requires to be determined in this general connection. Mr Robb seeks reimbursement of food and accommodation costs for the period of the employment. He argues this was promised to him in a discussion with Mr Walters on or about 10 December 2008 and was consistent with his previous employment by the former owner. Mr Walters denied on oath that he had made such a promise, and there was no corroborative evidence that that practice existed. Mr Winter, for example, gave evidence that Awaroa Lodge told him that his pay would be increased to cover food and board but he readily acknowledged that that might have been a function of his senior position as operations manager and he said that he had no knowledge of what position applied in relation to Mr Robb. Nor was Mr Hill's evidence on this point of any assistance to the Authority.

[47] I conclude then, in the absence of any corroboration of Mr Robb's recollection of his discussion with Mr Walters of 10 December 2008 or thereabouts, it cannot be concluded that Awaroa Lodge intended to pay for food and accommodation for Mr Robb.

For the cleaning arrangement, was Mr Robb a contractor or an employee?

[48] Awaroa Lodge says that Mr Robb accepted an independent contract to operate its cleaning business and if that view is made out, whatever the disputes between the parties on that period of their relationship, the Authority has no jurisdiction to take matters any further.

[49] The starting point for the Authority's inquiry must be the agreement between the parties. This is a somewhat scruffy document which has been extensively annotated against the typewritten original which appears to have been produced as a draft. Indeed, the typed copy provided to the Authority begins with the heading *"Draft terms of agreement"* and the word "draft" is struck out twice and the legend "okay" written above it.

[50] The agreement is expressed to be a *"short term contract - 02 February to end April 2009"* and is expressed to be with *"C Robb and Associates".* The provisions that follow identify that the subject matter of the agreement involves room cleaning on a labour-only basis with all of the equipment, including consumables, being provided by Awaroa Lodge. A rate per room is identified with different rates for different kinds of rooms. Items not covered are to be subject to agreement in writing. There is provision for the contractor's work to be checked before payment is authorised. Payment is made weekly in arrears.

[51] The second page of the agreement sets out a schedule of rates for each particular room written in handwriting and then the third page is a schedule of the *daily service* in respect to each of:

- • Lounge and dining rooms;
- • Bedrooms;
- • Linen;

• Bathrooms and toilet finishes.

[52] Then the next page is a schedule for check-out and again lists the procedures for respectively:

- • Lounge and dining rooms;
- • Bedrooms;
- • Linen.

[53] Mercifully, this agreement, unlikely the others, has been signed by both parties although only Awaroa Lodge has initialled each page.

[54] What then is the Authority to make of this document? First, the law as determined by *Bryson v. Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721 is settled and requires the Authority or the Court to consider *all relevant matters* in identifying whether an agreement is truly an agreement between the principal and a contractor on the one hand, or in truth, an agreement between an employer and an employee. The nature of the document itself is one of the relevant factors that the Authority must reflect on but by no means the only one. On the face of it, this agreement bears all of the hallmarks of a contractual rather than an employment agreement. There are no provisions in it of the sort that, as a matter of law, are required to be in employment agreements by force of the Act.

[55] Furthermore, there is nothing in the documentation before the Authority that even conveys the flavour of an employment relationship. As well, the contractor who looked after Awaroa Lodge's wages and other payments was clear that with effect from 31 January 2009, Mr Robb ceased to be employed by Awaroa Lodge and on and from 2 February 2009, Mr Robb became a contractor. I think this evidence is significant because it comes not from Awaroa Lodge itself but from the entity at least in part independent of Awaroa Lodge which was entrusted with the work. As an independent contractor, that entity called Bookkeeping 2U Limited would of course be under professional obligations especially to the Inland Revenue Department to properly account for those kinds of matters.

[56] Not surprisingly, Mr Walters' evidence is firmly on the side of the documentation in question being a contractual rather than an employment agreement. Amongst other things, Mr Walters refers to the history of the discussions between

Mr Robb and Awaroa Lodge about the cleaning contract. First of all, the agreement was always referred to, it seems, as the cleaning contract.

[57] Next, because Mr Robb had expressed interest in the cleaning contract before Awaroa Lodge purported to make him redundant as the gardener, it seems unlikely that he could have misunderstood the relationship between Awaroa Lodge and the previous contractor. The previous contractor was, according to the evidence before the Authority, a professional cleaning operator who provided those services for reward in a number of locations. While the nature of the relationship between the previous contractor and Awaroa Lodge is not evidence of the relationship between Awaroa Lodge and Mr Robb, it is I think persuasive evidence of the structure which Awaroa Lodge had in mind particularly when the evidence of all parties is simply that Mr Robb was being asked to *take over* what amounted to an existing relationship. Mr Robb uses that very phrase himself at para.56 of his brief of evidence when he says:

Awaroa Lodge Ltd offered to me that I 'take over the cleaning contract' for the cleaning of rooms at Awaroa Lodge under a 'short term contract - 02 February to end April 2009'.

[58] Mr Robb makes the point (erroneously as it happens) that his partner, Donna Lee, previously worked for Awaroa Lodge as a cleaner. That is not the position at all. Donna Lee was employed by the previous cleaning contractor and had no employment relationship at all with Awaroa Lodge. It seems unlikely that Mr Robb would not have been clear about who his partner was actually engaged by.

[59] Mr Robb also believed, again erroneously, that because he was not a director or shareholder of a limited liability company, and remained a natural person, he must have been an employee of Awaroa Lodge. That of course is not the legal position. There is nothing to preclude an individual from entering into contractual obligations in their own name. The fact that there was no limited liability company involved is neither here nor there.

[60] The nature of the payments is also an important factor to consider. The process was that Mr Robb filed an invoice every Monday which recorded the work that was done marrying the rooms cleaned to the various rates specified in the cleaning contract and then Awaroa Lodge would check those rooms to make sure that the work had been done and then would forward the invoice duly authorised for payment to the bookkeepers in Hamilton who would then pay a single payment to the bank account nominated by Mr Robb.

[61] As Awaroa Lodge notes, there was no breakdown of the payment to individual employees; if Mr Robb wished to employ other employees, he could do so (subject to their suitability being accepted by Awaroa Lodge) but Mr Robb had the obligation to pay those employees from the lump sum monies he received from Awaroa Lodge.

[62] *Bryson* emphasises the continuing importance of establishing the real nature of the relationship and the common law has developed a number of tests for trying to achieve that. Amongst the tests advanced in the common law is the "integration" test. This test considers how far the person is integrated into the affairs of the other party. Are they part and parcel of the organisation or truly separate from it? Mr Robb maintains that he performed various duties outside of the strict terms of the

contract such as portering duties and watering of plants. It is accepted that neither of these duties are contemplated within the terms of the cleaning contract. However, performance of them of themselves does not entitle a conclusion that the cleaning arrangement is integral to the business of the principal. Indeed, the history of the matter, as I have already noted, was that Awaroa Lodge had always had a separate entity performing its cleaning functions. It had never been done "in house". Mr Robb may have felt part of the organisation because of his former role as a gardener, when he plainly was part of the Awaroa Lodge team but it is difficult to see the cleaning operation as integral to the operation of Awaroa Lodge particularly given the history.

[63] Looking at the control test as another way of trying to assess the material before the Authority, Mr Robb advances the proposition that he was told what to do by Awaroa Lodge and therefore was under their control and thus an employee rather than a contractor. But the principal is entitled to determine the extent of the works required by the contractor and that is no more than what Awaroa Lodge has done in this case. They have not required Mr Robb to perform the duties in a particular way; all they have done is to ensure that he has in fact performed the duties for which he is seeking to be paid under the terms of the contract.

[64] Furthermore, Awaroa Lodge has not required Mr Robb is use a particular number of workers or indeed any workers at all. That is a matter for Mr Robb and he could determine how he delivered the work required in terms of the contract.

[65] Mr Robb protests in his evidence that the contract is expressed to be a *labour only* contract and therefore this must be a contract of service rather than a contract for services. But that is not right. Counsel for Awaroa Lodge refers to a decision of Member King in the Authority case *Bell v. J H L Paint Management Services Ltd* AA204/05 where the Authority found that the contractor was working on a labour only basis, submitted invoices, was registered for GST, and had all the tools and consumables provided by the principal. That case with one exception is on all fours with the present situation. The only matter on which it can be distinguished is the GST registration. Of course, GST registration is not of itself conclusive. In the present case Mr Robb was not registered for GST. That may be an oversight on his part or it may simply be a function of the revenue generated from the agreement. Certainly the absence of GST registration is I hold not a conclusive factor in ruling out the possibility of a contractual arrangement.

[66] I am satisfied that this was a contract for services on a labour only basis where Mr Robb as the contractor was paid a lump sum against his own invoice which allowed him to deliver the services in any way he chose using the tools and the consumables provided for the purpose by the principal.

[67] Given that conclusion, the Authority can take this aspect of Mr Robb's claim no further.

Determination

[68] Mr Robb has satisfied the Authority that he has a personal grievance as a consequence of having been unjustifiably dismissed from his role as a gardener. However, Mr Robb has not satisfied the Authority that there was any agreement that he be reimbursed for board and lodgings. Given that Mr Robb has satisfied the Authority on the fundamental issue of having been unjustifiably dismissed from his employment, he is entitled to have remedies considered by the Authority.

[69] Before considering that question, I am obligated by the statute to reflect on whether Mr Robb has contributed in any way to the circumstances giving rise to the grievance: s.124 of the Act applies. I am satisfied that there is no evidence that Mr Robb did anything to contribute to the grievance.

[70] I direct that Awaroa Lodge is to pay Mr Robb the following sums to remedy his personal grievance:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $5,000;
(b) A contribution to lost wages in the sum of $500 (reflecting the fact that Mr Robb commenced his contractual role almost immediately after the unjustified dismissal);
(c) The Authority's filing fee of $70.

Costs

[71] Costs are reserved. The parties are encouraged to endeavour to resolve costs between them; should that not be successful, application can be made to the Authority for costs to be fixed.

James Crichton

Member of the Employment Relations Authority