

[3] Also in dispute have been various matters associated with what Mr Cadman did in his role and who he reported to and how he obtained a set of keys. I will cover these as I need to in my determination.

[4] The law on the matter is straight forward enough. Despite the argument between the parties on the label given to Mr Cadman's employment at the point he relies upon a change being made to his status, I must determine the real nature of the relationship having regard to all relevant matters including the control, the integration and economic factors in the relationship. I have reviewed and applied the following legal principles:

- Section [6\(3\)](#) of the Act provides that, in determining the real nature of the relationships, the Court or Authority must consider all relevant matters (including the intention of the parties), but is not to treat the "label" as determinative.
- The integration test considers whether the work performed by the alleged employee is done as an integral part of the business and whether he or she has effectively become "part and parcel of the organisation".
- The focus on the fundamental or economic test is on the way the individual is engaged to perform the duties required. Some of the factors requiring consideration include: Did the worker provide his/her own equipment? Did he/she hire any helpers? What degree of financial risk was taken? What degree of responsibility for investment and management was there? Was there an opportunity for profit in the performance of the tasks?

(See *Bryson v Three Foot Six Ltd* [\[2003\] 1 ERNZ 581](#) (*Bryson v Three Foot Six Ltd (No 2)* [\[2005\] 1 ERNZ 372 \(SC\)](#))).

- A combination of the control and integration test is to assess the "economic reality" of the relationship. In other words did the putative employer direct not only what work was to be done but the manner in which it was to be done? (See *Muollo v Rotaru* [\[1995\] 2 ERNZ 414](#) Judge Goddard).

The Parties' Positions

[5] Mr Cadman says he was an employee. He accepted that he initially was engaged as a contractor. He says that he was integrated in the school and that he was under the school's control in his relationship with it, primarily through Mr Campbell and the school's Executive Officer, Robyn McKay. He also says that he was not in business on his own account and did not deprive a profit from what he was doing at the school. The Board denied that Mr Cadman was an employee. It says he was a contractor and that the relevant factors support that conclusion.

The Facts

[6] Mr Cadman commenced working for the Board of Trustees at Napier Girls High School on 17 November 2003 upon an arrangement with the school's previous Principal, and Mr Campbell and the school's Executive Officer, Robyn McKay. The latter two have given evidence that they considered he was a contractor then. There was no written agreement between the parties. However, Mr Campbell prepared a job description of the position and duties Mr Cadman was required to undertake. The job description was never updated at any later stage. Mr Cadman worked various but a regular number of hours of work at the school and spent some time purchasing stock on the school accounts and using his own accounts where the school did not have an account. His right to do this has not been challenged. He was not GST registered for his role at the school. He says he did not come and go from the school to do any other contracting work or employment for income from other sources during his time at the school. He says he worked regularly because Mr Campbell requested him to start work at a regular time each day. Also Mr Cadman relied upon his work being put up in a list on a white board by Mr Campbell.

[7] There was a Police check made on Mr Cadman when he started and it was never renewed. He did not have to report and be given a pass card at the office to be present on the school grounds like other tradesmen were required to do when they worked at the school, albeit with much less frequency. He parked at the school. He used the school's tools and equipment as well as his own tools. He attended some school functions at the end of school terms that other trades workers did not attend.

[8] He was paid upon receipt of an invoice and initially no tax was deducted from his invoices. Later withholding tax, which was written on the invoice at the school's office, was deducted from the gross sums claimed by Mr Cadman on his invoices. Mr Cadman and his partner, Caren

Cadman, accepted the payments with deductions made for tax. During his engagement to work at the school Mr Cadman says he did not know that his tax code had been changed and that IRD understood that he was paying PAYE.

[9] The invoices included his total hours claimed, but no details on times were provided and there were no details of all the work he says he was requested to carry out. Payments were nevertheless approved by Mr Campbell and then made by the school's office without any other checks on Mr Cadman's invoices. Arrangements for payment were made by Robyn McKay.

[10] Mr Cadman says he was told by Mr Campbell that someone from the office told him that Mr Cadman was now on the payroll and moved onto PAYE. Mr Campbell can not recall who told him this. He says Mr Campbell told him nothing had changed. Messrs Cadman and Campbell were vague except for the month they say this occurred.

[11] Mr Cadman discovered in preparing his employment relationship problem claim that IRD had information of a tax change. During the Authority's investigation the parties became very focussed on who changed the code and to determine what the actual deduction was from his invoices. It emerged during the Authority's investigation that the school continued to only deduct withholding tax and not PAYE.

[12] The Board says Mr Cadman's payments were different to the employees at the school who were paid by "*Payserve*", a payroll provider engaged by the school, and Mr Cadman was paid through the school's office from operating funds and special funds identified on special budget lines in the accounts.

[13] The Board's witnesses denied they changed the tax code. It has not been discovered who changed the tax code. The Board has endeavoured to find some explanation for what happened and the documents presented to the Authority indicate a real possibility of some mistake by IRD from the information available, albeit it has not been tested.

[14] Mr Cadman worked from a basement workshop provided at the school and there was telephone available there and he was placed on the telephone list.

[15] Mr Cadman's duties included maintenance work and work on a contract that Mr Campbell secured, although the school continued to pay Mr Cadman in that role. Mr Cadman says his role

extended to include various tasks around the school when Mr Campbell was promoted and became more involved in the computer technology in the school. At some point Mr Campbell gave Mr Cadman a full set of keys that Mr Cadman says he used, including at the request of teachers.

[16] When Mary Nixon started at the school she set about to familiarise herself with the school's operations. She inquired about Mr Cadman's role. In June 2006 she requested Robyn McKay to tell Mr Cadman his work at the school would require approval. However, it came as a surprise to her to learn that what happened instead was that Robyn McKay requested Mr Campbell to tell Mr Cadman that his role was to cease. In fact Messrs Campbell and Cadman say that that was their understanding. Mr Cadman left in June 2006 when he says he was told his role had ceased although he did return to the school twice later to carry out some work.

[17] He says that Mr Campbell told him he was no longer required and not to come back.

[18] He says initially he was looking for the school to act decently in giving him proper notice. The employment relationship problem has well and truly escalated from that point.

Determination

[19] Mr Cadman accepted that he was initially engaged as a contractor. The changes signalled in the conversation Mr Campbell says he had with the unknown person from the school's office might have been significant if not but for the categorical denials of the witnesses who have come forward. Replies were received belatedly from the school in the form of written statements from these people who could have been involved. Two of them appeared and gave clear and unambiguous statements in evidence. Also, Robyn McKay denied saying any such thing to Mr Campbell.

[20] Mr Cadman supported what Mr Campbell told him. I have to balance what they say and the two witnesses for the school have said. Messrs Cadman's and Campbell's evidence was not strictly consistent with each other on what they recalled being said at the time. Indeed Mr Cadman changed his evidence on some points. Therefore I conclude that Mr Cadman has not provided sufficient evidence to prove the truth about what Mr Campbell says he was told. There was no paper trail to record such an important change in the relationship other than about the tax. That change is also suspect because of the dispute over who made the change and what the deduction actually was. Mr Campbell's evidence that Mr Cadman was on the payroll and would be taxed PAYE without being able to remember who told him is unsafe to rely on for such a significant event. Also, there is an

issue about what has happened on the tax. It is possible that there has been a mistake, especially where the school says it continued to deduct withholding tax. This situation does not help Mr Cadman. It only adds to the reason why I find that the label of his relationship is not determinative. It is, however, a pointer to a continuing contracting relationship on the weight of the evidence because he started out as a contractor at the school. Also there is at least the one example of Mr Campbell contracting work and the parties have agreed that there were other contractors as examples of contracting services in the school.

[21] Therefore, I am required to consider the other tests. First, the parties have a different view on the control the Board exercised on Mr Cadman in his role. There is an absence of any written contract. There was no written employment agreement and the school's practice, including Mr Campbell's role, would suggest if Mr Cadman was made an employee, he should have received an employment agreement. Mr Campbell's evidence conflicted with the best practice arrangements that he was responsible for when he employed cleaners. There was a job description but it was not up dated with any changes that occurred. It was not a substitute for a contract. Given that the job description was created by Mr Campbell without reporting or appointing Mr Cadman to a position these factors are not determinative of an employment status.

[22] Mr Cadman's duties were also written up on the white board by Mr Campbell. However, Mr Cadman was left alone to complete whatever Mr Campbell required him to do. Over time Mr Cadman's role evolved to include different and new tasks, including getting keys from Mr Campbell to use around the school. There is some doubt about the set of keys given to Mr Cadman being put on the school's key register. The explanation for him having the keys has not been satisfactorily explained although Mr Campbell would have to take responsibility for such a delegation - if he had it. Mr Cadman has not satisfied me that such an arrangement would be inconsistent with contracting where it happens in many instances that contractors have keys. Also, Ms Nixon focussed on this issue because she tried to find out what keys Mr Cadman had.

[23] I have weighed up that Mr Cadman used the school's workshop and that his name appeared on the telephone list. Mr Cadman's role and regularity of attendance made it entirely reasonable for him to use the workshop and be on the telephone list as the relationship evolved, particularly since Mr Campbell had a role with him and his own role changed during the time.

[24] It is only on Mr Campbell's and Mr Cadman's word that Mr Cadman started work at set times, that on many occasions he bought stock before starting, and that he was requested to carry

out tasks each day given to him by Mr Campbell. His finishing time was not prescribed. Mr Cadman accepted his finishing time was flexible.

[25] Mr Cadman was treated differently to other contractors, entering the school grounds, who required passes. He could use the school's car parks without having to ask but it appears that so could anyone else. The only control therefore seemed to be supervision on the duties he was given and start times being given to him and the purchasing authority, possessing the keys and attending end of term functions. These are not determinative either because Mr Cadman was free to put his total hours on invoice without any details of starting and finishing work and what he actually did.

[26] The school's controls and monitoring appear somewhat haphazard, thus explaining why Mary Nixon being a new Principal at the school prudently started to look into what was happening and wanted to exercise approval on Mr Cadman's activities and the invoices he submitted. There were no checks on his purchases, which were accepted when he made any claim for them.

[27] There was no formal arrangement for Mr Cadman to seek approval to take leave and if he did take time off the regularity of his situation meant that he could return with some certainty of work because it had become the practice. He made the decision to take time off to restore his home and when Mr Campbell asked him about changing to become an employee he answered that it would have to wait until after he had restored his home. Although Mr Cadman says he could not take time off to restore his home when he would have liked to because of the pressure of work at the school, I hold that that was his decision and there is evidence that nothing prevented him from taking time off if he needed to.

[28] This conclusion is supported by the pay arrangements where his pay was itemised by activity, that Mr Cadman was not paid by "*Payserve*" and that he was paid by invoice arrangement. Moreover Mr Cadman expressed at that time a hesitancy to change because of tax implications on his expenses. When he was told by Mr Campbell what the "*member from the office*" had said about going on the payroll and paying PAYE, he and Mrs Cadman considered the trade off involved getting other entitlements. This is not plausible in my opinion for the reason that Mr Cadman has never taken holidays except when Mr Campbell did not work, Mr Cadman did not get paid holidays and there is no record of any leave taken. His invoices included total hours claimed and prepayments for hours to be undertaken on at least one occasion. I conclude that in the absence of any checks made on time taken off and prepayment invoices that Mr Cadman had some choice in what he did and when to complete such work.

[29] I conclude that these are also pointers to a contracting arrangement, although Mr Cadman argues they are examples of him being in an integrated employment relationship with controls over him. His job could have been equally and easily done by a contractor or employee. The determination of the real nature of the relationship is about how it operated in practice given that there was more integration the longer Mr Cadman worked at the school. Mr Cadman was not given an employment agreement. Mr Campbell did not follow up the comment about Mr Cadman's tax and status that he says he was told about by someone in the school's office. It would have been reasonable to expect such a significant change to be followed up in the circumstances. Mr Cadman was not appointed in the same way that employees were, including cleaners employed by Mr Campbell. He was not transferred to "*Payserve*" for payroll action that would have been entirely consistent with any change. There is no evidence of Ms McKay's involvement of making such a decision, especially since she denied it. Mr Cadman's responsibility to her seems too casual to warrant a functional reporting line as an employee, I hold. Much of the responsibility rested with Mr Campbell for Mr Cadman's work. To this end Mr Campbell did not have any formal responsibility on Mr Cadman's status that was put into place at the start of the engagement.

[30] I accept that Mr Cadman had a Police check like any employee might. But he only ever had one check at the outset of his contracting arrangement with the Board. This does not assist him because when he says he became an employee one would have presumed he would have had to have another check and like the absence of any other requirements being followed, there was no check made. His evidence I find was inconsistent with his claims about the Police vetting him a couple of weeks before his relationship with the Board ended. It seems he was incorrect on this point. It was acknowledged he was a regular attendee entering the school. The arrangement put in place suited everyone as a convenience, given the regularity of his attendance, I hold. There is nothing that suggests the school did not have to act in this way if he was a contractor and had to treat him the same as other less frequent contractors entering the school who had to get passes. Therefore even though Mr Cadman became more integrated and familiar in the work place the control and the evidence surrounding the purported change in his status tilt the balance in favour of a continuing contracting arrangement on how his role operated in practice.

[31] The last test involves the economic or fundamental situation in the parties' relationship and whether Mr Cadman was in business on his own account. In this regard Mr Cadman was not GST registered. This is explained by the income threshold required. He says that he did not have to be registered. He agreed to submit invoices to the school for payment and reimbursements. He says

he did not gain from any purchases he made for the school. I accept that he was reimbursed the cost of some of the purchases and did not profit from them. However that arrangement only started when Mr Cadman found that the school did not have accounts with some suppliers that he had and where the school's suppliers could not provide the items Mr Cadman needed. He acknowledged a contracting arrangement to start with. He was loath to change when Mr Campbell broached it with him, and he was concerned about what would happen to his expenses. His pay arrangements were different to employees in the school. The payment method suggests he enjoyed the benefit of contracting and as such used the arrangement. Mrs Cadman kept the school arrangement separate from their life style block financial arrangements because it was a shared arrangement. Mr Cadman's separate financial arrangements are not determinative of being an employee given the arrangements at the school to pay and reimburse him and the initial intention for him to be a contractor. Any control and integration is outweighed by the payment methods and leave that applied to Mr Cadman, and that he invoiced the school and that there is insufficient proof of any change in the arrangement, I hold.

[32] Mr Cadman was reliant on his invoices being paid and withholding tax being deducted that was not challenged by him when the invoices were paid. There is nothing sinister about any tax mistake and indeed it seems even although Mr Cadman thought he was paying PAYE it appears withholding tax continued to be deducted.

[33] The Board did not follow any employment dispute resolution procedure in terminating the arrangement and indeed Mary Nixon is very surprised about what she has learned happened then. The Authority was told that Mr Cadman returned to work twice afterwards and was told not to return by Mr Campbell who says he was told by Mrs McKay. Ms Nixon's approach to the matter appears more consistent with a contracting arrangement coming to an end. Indeed I am satisfied that her earlier involvement was to put in place approvals around the arrangement, rather than trying to control the work Mr Cadman undertook.

[34] Mr Cadman's duties are the last area of analysis to try and determine the real nature of the relationship with the Board. I am satisfied that the duties provided to him could be done without any requirement that Mr Cadman's attendance had to be monitored to require him to be present to undertake such duties. Except for duties required to be undertaken to meet timetabled school events I conclude that if Mr Cadman was not present Mr Campbell would have had to find someone else or do them himself. The responsibility was Mr Campbell's to get things done. Mr Cadman's presence at the school seems to have become a feature for staff, who he says gave him duties. It seems that

they were reasonably reacting to his presence and willingness to help out. Mr Campbell was fortunate that Mr Cadman was often present and willing and available to charge his hours by invoice for such work, including undertaking whatever the white board duties were. There was no formal arrangement approved in regard to Mr Cadman when Mr Campbell changed his role. As I have said it was fortunate for Campbell that he could rely upon Mr Cadman. That does not make Mr Cadman an employee, I hold.

Conclusion

[35] I conclude that Denis Cadman was engaged as a contractor and remained as such. There is no need to reconvene to determine the circumstances of the termination.

Costs

[36] Costs as requested are reserved.

P R Stapp
Member of the Authority