IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 103
5378547

	BETWEEN	PETER CHAMPION Applicant
	AND	WHITE, FOX & JONES Respondent

Member of Authority:	Christine Hickey
Representatives:	Geoff Brodie for Applicant Kerry Smith for Respondent
Investigation Meeting:	5 February 2013 at Christchurch
Submissions received:	At the investigation meeting from both parties and 8 February 2013 & 23 February 2013 from Applicant, and 21 February 2013 from Respondent
Determination:	7 June 2013

DETERMINATION OF THE AUTHORITY

A. Peter Champion was an employee of White Fox & Jones when he worked as a consultant.

B. White Fox & Jones do not owe Peter Champion any further remuneration.

Employment relationship problem

[1] Mr Champion became a partner in the law firm of White, Fox & Jones in 1994 when the law firm in which he was a partner merged with White Fox. Mr Champion continued as a partner with White Fox until his retirement from the partnership which took effect on 30 November 2001.

[2] The partners and Mr Champion wished him to continue working for White Fox & Jones. Therefore, following his retirement as a partner, they agreed that he would become a consultant from 1 December 2001. The agreement between the parties was briefly recorded in the following document:

> ***P C Champion***
> ***Consultancy Offer***
> ***For the 12 month period commencing 1 December 2001***
>
> - *The current arrangement expires on 4 November 2001.*
> - *From 1 December 2001 retires as partner – becomes a consultant.*
> - *Consultancy is for a 12 month period.*
> - *Remuneration:*
>   *Base payment of $60,000pa on the expectation of gross fee level of about $150,000.*
>   *If gross (and collected) fees exceed $150,000 a further payment of 40% of the fees exceeding $150,000 to be made.*
> - *The consultancy (and its terms) to be reviewed annually. Consultancy will not be renewed beyond 65 years.*
> - *Carpark to be provided at WFJ cost.*
> - *Income protection insurance if rearranged by PCC firm to pay any stand down period up to 13 weeks.*

[3] Mr Champion and Hugh Matthews, the Managing Partner of White Fox & Jones, signed the agreement on 10 December 2001. I heard evidence from both of them at the investigation meeting.

[4] At some later date during 2006, the per annum remuneration changed to be a base rate of $64,500 plus $5,500 paid to Mr Champion's wife, Patricia Champion, equating with an annual base rate of $70,000. The point at which 40% of gross collected fees would be awarded was when fees exceeded $160,000 for the year. The payment to Mrs Champion ceased after 2006. The base payment gradually rose and from 1 December 2007 was $71,500 with the minimum level of expected fees remaining at $160,000.

[5] The financial year for White Fox & Jones is from 1 December to 30 November the following year. It is common ground that the fees billed and collected for the year were calculated after 1 December each year and Mr Champion's further remuneration, if any, was paid to him after that.

[6] In March 2010, Mr Champion gave written notice to the partners that he intended to end his consultancy and leave the firm. He did so on 1 April 2010. For the period 1 December 2009 to 1 April 2010, Mr Champion was paid his base

payment totalling $24,750. He has not been paid any percentage of the gross fees collected over that period.

[7] Mr Champion asks the Authority to determine that he was an employee when he worked as a consultant for White Fox & Jones. Mr Champion also asks the Authority to determine that although his employment terminated partway through the financial year, he is entitled to the additional payment above his salary, calculated pro rata, for one third of the full year. Mr Champion calculates that the amount that White Fox & Jones should pay him by way of additional remuneration is $39,735.71. He also says that if further fees were collected for work that he had completed while at White Fox he would be entitled to 40% of those additional fees.

[8] White Fox & Jones argue that there was not an employment relationship between Mr Champion and the firm. Instead, it says Mr Champion was engaged as an independent contractor in the role of consultant. In the alternative, White Fox & Jones argue that if the Authority finds that Mr Champion was an employee, no additional remuneration is due or owing to him. White Fox & Jones says that the amount of gross fees rendered and collected had to exceed $160,000 for the year in order to trigger the entitlement to additional remuneration. White Fox & Jones says that Mr Champion resigned before the end of the year and did not achieve the criteria of $160,000 of collected fees required to trigger an entitlement to any additional payment for the year ending 30 November 2010.

Issues

[9] The issues the Authority needs to determine are:

(a) whether the Authority has jurisdiction; whether Mr Champion was an employee of White Fox & Jones during his time as a consultant,

(i) as a sub-issue - my ability to take into consideration an admission in correspondence between the parties; that is, whether that admission is privileged or not, and

(b) if Mr Champion was an employee whether he is entitled to additional remuneration for the year ending 30 November 2010,

(c) Legal costs

Determination

[10] First, I need to determine whether Mr Champion was an employee or an independent contractor. This is a threshold issue. If Mr Champion was an independent contractor the Authority has no jurisdiction to determine whether or not he is owed anything further by White Fox.

Can I take into account a portion of the letter from White Fox's solicitor dated 14 December 2011?

[11] On 14 December 2011 White Fox sent Mr Brodie a letter in response to a letter of his dated 25 November 2011. A redacted version of the letter was attached to the statement in reply. Paragraph 3 reads:

> *We have previously set out the basis on which we do not consider Mr Champion is entitled to payment in our without prejudice letter dated 18 October 2011.*
>
> [redacted portion of paragraph]
>
> *…we record out client's position on an open basis in the portion of the letter as follows:*

[12] White Fox's counsel objects to the production of the full letter on the basis that it is privileged. Mr Smith submits that the letter must be considered within its context. On 18 October 2011 he wrote to Mr Brodie about the dispute in a letter marked:

> *… "without prejudice except as to costs". That letter included a response to Mr Champion's assertion (through Mr Brodie) that he was an employee and noted that, while White Fox reserved its position, it would, for the purposes of responding on a without prejudice basis, reply to Mr Brodie's letter of 7 September 2011 as if Mr Champion was an employee. Mr Brodie replied on 25 November 2011.*
>
> *This letter of 14 December is part of a chain of correspondence attempting to resolve the dispute and including one other letter with a statement that it was without prejudice. It follows on from what was said in the exchange of 7 September and 18 October.*
>
> *The redacted version of the 14 December letter obliterates part of the passage in paragraph 3 so that what is recorded in the open section are White Fox's arguments about the claimed commission. That is consistent with the without prejudice stance taken in the 18 October letter. The syntax of the letter supports that argument; White Fox was contesting Mr Champion's argument by pointing out certain consequences of Mr Champion claiming to be an employee.*

[13] Mr Smith also submits that if the full letter is admitted it is but one of the factors to be considered as the s.6 test set out in the Employment Relations Act 2000 requires the real nature of the relationship to be determined.

[14] It is artificial for me to pretend that I do not know what paragraph 3 says, although if it is 'without privilege" I should not know. I raised with the parties at the investigation meeting the possibility of me recusing myself from determining Mr Champion's application and handing it over to another Authority member. Both parties agreed to me continuing to investigate and determine the application. They expressed the view that should I not consider the full letter admissible I would be able to ignore the redacted portion in reaching my determination.

[15] Mr Brodie acknowledges that a letter in a chain of "without prejudice" correspondence may be regarded as subject to the same privilege as previous letters despite the absence of the words "without prejudice" on the letter. He says that is only so where it is plain from the context that the parties intended to continue on a without prejudice basis. He submits that in the 14 December 2012 letter the first five lines of paragraph 3:

> *…are only consistent with the completely alternative interpretation, that is for the purpose of resolving the dispute Buddle Findlay are prepared:*
>
> *a. To accept that Mr Champion is an employee; and*
>
> *b. To record White Fox & Jones position on an open basis in this portion of the letter as follows.*

[16] Section 160 of the Act empowers the Authority to admit evidence as it thinks fit *whether strictly legal evidence or not*. However, that does not authorise the Authority to override privilege.

[17] The Employment Court decision of Judge Inglis in *Idea Services Limited (in statutory management) v Barker*[1] clarified that the Authority (and the Court) should be guided by the principles of the Evidence Act 2006 to protect:

> *…a broader public interest in a consistency of approach and of lawyers being in a position to advise their clients with a degree of certainty*[2]

[1] [201] NZEmpC 112
[2] Ibid, at [31], with reference to *Miller v Fonterra Co-operative Group Ltd* [2012] NZEmpC 49 at [15]

[18] Judge Inglis emphasised the public policy of *encouraging litigants to settle their differences rather than litigate them to a conclusion*[3]. She referred to s.57(1) of the Evidence Act which provides:

> *A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—*
> - *(a) was intended to be confidential; and*
> - *(b) was made in connection with an attempt to settle or mediate the dispute between the persons.*

[19] I consider that the redacted statement in paragraph 3 the letter of 14 December 2011 was clearly made in a chain of without prejudice correspondence and was written in connection with an attempt to settle the dispute between the parties.

[20] I also consider that only the words appearing after

> *we record our client's position on an open basis in the portion of the letter as follows:*

were not intended to be confidential between the parties as they were clearly stated to be on an open basis. The words above that are privileged and should not, and will not, be taken into account by me in determining Mr Champion's status under s.6 of the Act.

Was Mr Champion an employee?

[21] The relevant parts of s.6 of the Employment Relations Act 2000 state:

> *In this Act, unless the context otherwise requires,* employee—
> - *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and …*
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
> *(3) For the purposes of subsection (2), the court or the Authority—*
> - *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
> - *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[3] Ibid, at [29]

[22] The tests I need to apply in determining the real nature of the relationship between the parties are well established and have been approved by the Supreme Court in *Bryson v Three Foot Six Limited*[4] in which the Court restored the Employment Court decision of Judge Shaw[5]. Judge Shaw summarised the principles applicable to an analysis under s.6 as:

> - *The Court must determine the real nature of the relationship.*
> - *The intention of the parties is still relevant but no longer decisive.*
> - *Statements by 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.*[6]

[23] The ultimate decision about whether someone is an employee *depends upon the entire factual matrix*[7].

[24] The starting point is an examination of the contract, sketchy though it is in this case. The agreement does not state whether the parties considered Mr Champion to be an employee or an independent contractor. So, while the contract is relevant it is not determinative of Mr Champion's employment status.

[25] It is not possible to establish if the parties had any common intention as to the nature of Mr Champion's working relationship with the firm. Both Mr Champion and Mr Matthews said that when agreeing on the arrangements for Mr Champion's consultancy they did not give any thought to whether or not he became an employee of the firm. Mr Matthews said:

> *I don't think anyone gave thought to what kind of creature a consultant was in terms of labelling or defining it.*

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[4] [2005] NZSC 34
[5] [2003] 1 ERNZ 581
[6] At para [19]
[7] At para [21]

[26] Mr Champion said:

> *It is common practice for former partner consultants to sit in a somewhat grey area initially.*

[27] If the parties had been asked at the time whether they considered Mr Champion to have been an employee or an independent contractor they may have said that he was neither.

[28] There are two aspects of the contract that are characteristic of a contract of service; the provision of a car park and income protection insurance, as well the agreement to the firm paying Mr Champion for any 13 week stand-down period if he was unable to work. After Mr Champion turned 65 years the firm's insurer no longer continued to offer him income protection insurance but he was provided with a car park from 2001 until he left in 2010.

[29] The fact that Mr Champion received a *base payment* as well as an at-risk or conditional component of remuneration is a neutral factor as some independent contractors and some employees are remunerated on a similar basis.

[30] *The question of industry practice* in this case may be less helpful than in some industries. However, it is important to consider it. A consultant is generally, or at least was in the past, a retired partner of a law firm who is edging towards retirement and has resigned from the partnership. Therefore, she or he is no longer an owner of the business. Consultants retain their connection with the firm and the ability to do work for which they are remunerated in some way. Both parties benefit. The law firm retains the services, and fee earning capacity, of a trusted and experienced former partner, and the consultant can continue working in a way that suits them but without the risks and decisions inherent in being a partner in the business.

[31] Consultants range from working full-time, as Mr Champion did, to setting and working their own hours and at their own pace. As senior and respected members of the firm and former partners consultants have a reasonable amount of bargaining power and it is likely that their arrangements vary considerably from consultant to consultant, perhaps even within the same firm. The similarity is generally that all work is done in the name of the law firm and is billed to clients by the law firm; not directly by the consultant.

[32] The *control test* in relation to Mr Champion's work is not a determinative factor in assessing whether he was an employee or not because he was a former partner of the firm and a very senior and experienced solicitor. He continued to work largely for the same clients that he had worked for as a partner. That meant there was very little direct control of Mr Champion's work by the firm. However, there was control over the billing process that he had to use. He recorded his time and billed clients in line with the firm's administrative practices. Mr Matthews, as the managing partner, exercised some control over the billing process. There is evidence that there was friction from time to time between Mr Matthews and Mr Champion about Mr Champion's billing practices. Mr Matthews sought to ensure that large unbilled amounts of time on a file were not left unbilled for long periods. I consider that the amount of control exercised over Mr Champion's work in all the circumstances is suggestive of a contract for service.

[33] Mr Champion was free to come and go as he pleased and I have been asked to consider that as pointing towards him being an independent contractor. Instead I consider that to be a marker of his professional status and the level of trust the firm had in him. As a matter of industry practice a solicitor's work output is generally judged on the objective factor of billable time recorded rather than what number of hours was worked or when they worked. However, Mr Champion did work normal office hours and although that may not have been controlled in any overt way by the firm I consider that it was expected that Mr Champion remained easily accessible to the clients during office hours.

[34] Mr Champion took leave during the Christmas/New Year period each year when the firm closed down. He continued to be paid his base payment over those periods.

[35] The *integration test* requires an examination of whether the work performed by Mr Champion was an integral part of the business and whether he was "part and parcel of the organisation". I consider the fact that all of Mr Champion's work was done in the firm's name and billed by the firm to be suggestive of Mr Champion being an integral part of the business. Indeed for the most part, he continued to service exactly the same clients as he had when he had been a partner. That suggests that both parties considered those clients to be clients of the firm and not of Mr Champion's own personal business.

[36] *Fundamental test* – did Mr Champion engage himself to perform services with White Fox as a person in business on his own account? Mr Champion's tax affairs were structured so that he gained a benefit commonly gained by a self-employed person. He was paid a gross amount and paid his own income tax, which allowed him to claim his expenses, such as the use of a home office against his tax. He paid his own ACC levies. No PAYE or withholding tax was paid on his behalf by White Fox. Mr Champion used his home office at times in the evenings and on weekends for work he was undertaking for White Fox.

[37] Mr Champion says he carried on doing his own tax returns and paying his tax personally as he always had done. I consider that he did not really turn his mind to whether his tax arrangements made him an independent contractor or not; he simply continued operating as he had for many years. Mr Champion told me that he believed he was entitled to organise his tax that way as he also had another source of income independent of his work at White Fox. In any event, a person's tax status is not alone determinative of whether or not they were any employee. If I find that Mr Champion was an employee any retrospective tax or ACC issues arising will be a matter for him and the IRD and the ACC.

[38] During 2006 Mrs Champion was directly paid $5,500 to recognise her work as *an administrative assistant* to Mr Champion. That was in addition to Mr Champion's base payment which had risen to $64,500. White Fox paid PAYE on the amount that was paid to Mrs Champion.

[39] Mr Smith submits that *employment agreements do not confer rights or benefits on third* parties. That is generally correct. The fact that Mr Champion was considered to needed administrative assistance not provided by the firm is suggestive of Mr Champion being an independent contractor rather than an employee. However, I consider that payment was more in the way of a courtesy to Mr and Mrs Champion because he was a former partner. Partners' wives were commonly paid such amounts. However, that payment was stopped after 2006 for White Fox's own tax reasons.

[40] White Fox provided an office for Mr Champion and paid all outgoings for his work (other than the payment to Mrs Champion which was paid for only part of the period), including professional liability insurance.

[41] White Fox paid for Mr Champion's practicing certificate. Mr Matthews says that was on the basis that Mr Champion was a "non-partner". Mr Brodie submits that it is determinative that White Fox paid the New Zealand Law Society for Mr Champion's practising certificate on the basis that he was an employed solicitor. That is, neither White Fox nor Mr Champion were required to pay the Inspectorate Fee and the Lawyers Fidelity Fund contribution that a solicitor practising on his or her own account would have been required to pay. Mr Brodie submits that if White Fox actually considered Mr Champion to have been practising on his own account it would have been misleading the New Zealand Law Society to pay for a practising certificate on the basis that Mr Champion was an employed solicitor.

[42] Mr Brodie also says that in only having a practising certificate as an employed solicitor it would have been illegal for Mr Champion to have been practising on his own account. I understand Mr Brodie means me to take from that that Mr Champion was not so doing.

[43] In brief, Mr Smith submits that the consideration of whether Mr Champion was an independent contractor or not is not resolved by the provisions of the Lawyers and Conveyancers Act 2006; it is not determinative. He submits that at worst there may be some outstanding issues between Mr Champion, the NZ Law Society and White Fox about what the appropriate practising certificate and appropriate fees would have been. The issue about the appropriate practising certificate is only *one facet of determining the real nature of the relationship*.

[44] I agree with Mr Smith, the question of the practising certificate is only one facet in my determination of the real nature of the relationship. However, it is an important one. As Chief Judge Colgan said in *Strachan v Moodie*[8]:

> *Although what the law governing legal practice allowed and prohibited does not, of course, dictate necessarily the nature of the parties' relationship, consistency with legal requirements is one useful indicator of the legal nature of that relationship.*

[45] I consider that White Fox and Mr Champion would not have knowingly misled the NZLS or paid less than would have been necessary for Mr Champion's practising certificate. That view combined with the fact that White Fox paid for the

[8] [2012] NZEmpC 95, at para [55]

practising certificate and that was an implicit feature of the agreement between it and Mr Champion is weighty evidence of a contract of service. I note that the form provided to White Fox by the NZLS in August 2008 for the renewal of practicing certificates provides for only two categories of legal staff – partners and employees. Mr Champion was listed as an *employee* and a *consultant* by White Fox's administrative staff.

[46] Mr Champion did not invoice White Fox for payment but was simply paid on a fortnightly basis a 1/26th portion of the annual *base payment*. The amount he was paid was not inclusive of GST. He was not registered for GST as an independent contractor.

[47] Neither party ever envisaged that as a consultant Mr Champion could service clients of his own separately from his work for White Fox. Mr Champion says he had never thought about it but believed that if he had contemplated doing that then he would have had to seek permission from the partners first. In addition, it is unlikely to have been acceptable to White Fox for Mr Champion to sub-contract his consultancy work out to another solicitor under his direction and control to do work for the firm's clients. That implies that Mr Champion was working for the firm rather than on his own account.

[48] When Mr Champion left White Fox to go to a competing firm he did not consider that he could, as of right, transfer his client's files with him. He said he would never have done that unless the clients requested that to be done.

[49] I conclude that Mr Champion was an integral part of White Fox and not fundamentally acting in business on his own account. He was an employee of White Fox when he was acting as a consultant. Therefore, the Authority has jurisdiction to deal with the question of whether he is owed any further payment by White Fox.

Is Mr Champion owed 40% of the fees collected on his work to 30 November 2010?

[50] By the 2009/2010 year the point at which 40% of gross collected fees would be paid was when fees exceeded $160,000 for the year. Mr Champion says that he generated total fees of $158,778 for White Fox in the period 1 December 2009 to 30 November 2010, of which $152,672.27 was collected. He considers it manifestly unjust that he was not paid a pro-rated portion of those fees, to recognise that he only worked for a third of the year.

[51] He says that one third of $160,000 is $53,333 and so having worked only one third of the year he should be entitled to 40% of fees collected over $53,333. Therefore, he takes $53,333 from $152, 672.27 to get $99,339.27 of which 40% is $39,735.71.

[52] The contract carried on for several years on the same basis of remuneration. That is, by mutual understanding it was expected that Mr Champion would be paid a set base payment per year on the expectation that he generated a gross fee level of about $160,000 for the firm (in the relevant year). After that *if* the collected fees for his work exceeded $160,000 he would be paid a further payment of 40% of the fees collected over and above $160,000.

[53] The plain words of the contract do not contain any consideration of how and when the measurement of whether fees from Mr Champion's work exceeded $160,000 was to take place. However, for all the years of Mr Champion's consultancy the relevant year was accepted as being from 1 December to 30 November the following year. A calculation was commonly made after that date of fees generated for the full year to 30 November (plus any bills paid from the previous year worked) less bills owed to 30 November. For example the total fees collected to 30 November 2009 were $225,177. From this $160,000 was deducted leaving $65,177 of which 40% was $26,070.80. That is what Mr Champion was paid for the year ending 30 November 2009 over and above the $71,500 base payment.

[54] Mr Champion argues that if he had been told at the time when he entered into the contract that if he only worked for part of a financial year he would not have been entitled to a portion of the fees that he had generated and had been recovered in that time he would not have signed the contract. However, it is common ground that issue was not one that was discussed when the consultancy contract was being considered.

[55] There was no argument made that the words of the provision are ambiguous or that there was any mistake in the contract. Instead, Mr Brodie submits that I should imply a term into the contract that the remuneration is subject to apportionment for part of a year. Mr Brodie submits a pro-rata term is necessary to give efficacy to the contract because the contract itself does not make allowance for the consequences of a termination of the contract part-way through a year. He submits that it does not make

sense that the base payment can be apportioned pro-rata for a part year but that the further remuneration component cannot be.

[56] Mr Brodie submits that it is inequitable to allow White Fox to benefit from the entire amount of fees over the base level for fee production simply because Mr Champion's fee producing work did not take place over a 12 month period.

[57] Mr Brodie submits that a pro-rata clause is so obvious that it goes without saying; that is, if an officious bystander had asked what would happen in the event that only a part-year was worked the inevitable result would have been insistence by Mr Champion that *the top-up must be available on a pro rate* (sic) *basis for a part year*. Mr Brodie also submits that an implied clause is capable of clear expression and would not conflict with any express term of the contract.

[58] Mr Brodie compares Mr Champion's situation to cases in which the courts have taken an entire contract approach and says it is unconscionable to allow Mr Champion to work for part of a year without forewarning him that his usual remuneration would not apply.

[59] In the alternative, he submits that this is a proper case for making an award to Mr Champion on a quantum meruit basis. He says there is a gap in the contract as it fails to provide for what is to happen if Mr Champion works for less than a year.

[60] Finally, also in the alternative, Mr Brodie submits that the contract was cancelled when Mr Champion gave notice and White Fox accepted it. Therefore, the Authority can use s.9 of the Contractual Remedies Act 1979 to grant Mr Champion relief by making sure that White Fox does not retain the full benefit of work done by Mr Champion in his performance of the contract.

[61] Mr Smith on behalf of White Fox submits that the contract is simple and clear and was negotiated by experienced lawyers. He submits that the further payment over and above the $71,500 was an 'at risk' component achieved exclusively through performance. He submits that the payment of the second part of Mr Champion's remuneration was not discretionary but that once the target of $160,000 fees collected had been reached Mr Champion was owed further income.

[62] Mr Smith submits that the purpose of interpreting the agreement is to objectively establish the meaning the parties intended for it but not to rewrite it. He

also submits that it does not make business sense to produce a result *open to manipulation depending on when the employee leaves*, which is what he argues would be the case if Mr Champion's formula was accepted.

[63] Mr Smith also submits that the clause is a machinery clause which the courts are loath to interfere with if it is not problematic in the way that it operates. The mechanism worked appropriately in the previous years. The difference being that Mr Champion is seeking to apply it differently for the 2010 year. However, fixing the target at $160,000 produces a fixed and constant outcome.

[64] White Fox submits that the essence of Mr Champion's claim amounts to being dissatisfied because he believes the outcome has been unfair.

Determination

[65] The leading authority on contract interpretation is the Supreme Court decision in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[9]. The Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers & Related Trade Unions*[10] makes it clear that *Vector* also applies to the interpretation of employment agreements.

[66] The essential starting point for contract construction was stated in the Supreme Court case of *Vector Gas Ltd v Bay of Plenty Energy Ltd*[11] :

> *The general principle is that words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.*

[67] The starting point for consideration is the words of the contract:

> *Remuneration:*
>
> *Base payment of* [$71,500] *on the expectation of gross fee level of about* [$160,000].
>
> *If gross (and collected) fees exceed* [$160,000] *a further payment of 40% of the fees exceeding* [$160,000] *to be made.*

[68] Mr Champion was expected to earn gross fees of about $160,000 for which he would be rewarded a set base payment per year. Mr Champion was paid a fortnightly portion of the base payment over the period of 12 months between 1 December and 30

[9] [2010] 2 NZLR 444
[10] [2010] NZCA 317
[11] [2010] 2 NZLR 444, at [199]

November the following year, for the 2010 year that base payment was $71,500 of which he received $24,750.

[69] If Mr Champion exceeded the fee target in any one year he could expect to be rewarded a further amount worked out at 40% of what was collected over and above $160,000. However, for the relevant year only $152, 672.27 was recovered.

[70] The target amount for Mr Champion to achieve any further payment was $160,000 in fees collected. I disagree with Mr Champion's assumption that the reason he has not received any further payment for the 2010 year was that he had not earned fees over the full 12 month period. The 12 month period was the objective and accepted measurement point for assessing whether the target of $160,000 gross fees collected had been met; it was also the point for an assessment to be made that most accords with business common sense as it was the end of the firm's financial year. That practice was accepted by both parties for the eight full years of Mr Champion's consultancy.

[71] As it happens in the relevant year Mr Champion only worked for White Fox for about 1/3 of the year. However, had he worked for that period and yet achieved collected fees of over $160,000 he would have been entitled to the further payment calculated at 40% of fees over and above $160,000.

[72] The contractual words are clear and unambiguous. Their ordinary meaning does not go against business common sense. I am reluctant to imply an additional term into a contract entered into by experienced lawyers. I disagree that the contract needs me to imply a term that allows Mr Champion a pro-rata amount of fees over and above the base payment that he was paid. That is unnecessary to give efficacy to the contract; the contract was effective without it. It had operated successfully for eight years. I do not agree that the contract became ineffective without a pro rata term when the contract only ran for part of a year. Again, if Mr Champion had achieved the target of over $160,000 fees he would have been due a further payment.

[73] I recognise that the agreement to further payment was in the nature of an incentive to Mr Champion to generate fees over the agreed minimum target. However, the remuneration for meeting that minimum target was the base payment agreed and paid per annum.

[74] This situation is distinguishable from the cases the parties referred me to.

[75] An employee's resignation is not rescission, cancellation, repudiation or breach of the employment contract. It is not the kind of situation that s.9 of the Contractual Remedies Act 1979 is intended to apply to and I do not apply it.

[76] Mr Champion is not entitled to any further payment from White Fox.

Costs

[77] Costs are reserved. Both parties have had some success in these proceedings and I invite them to agree on costs between themselves. If that is not possible the party applying for costs may lodge a memorandum within 28 days of the date of this determination. The other party will then have 14 days to lodge a memorandum in response.

Christine Hickey
Member of the Employment Relations Authority