

Employment Relationship Problem

[1] Andrew Dearle says that he was unjustifiably disadvantaged in, and dismissed from, his employment with Leroy Albany Hotel Limited (Leroy Albany or the Hotel). He further claims there was a breach of the obligations of good faith and that he is owed holiday pay.

[2] Leroy Albany says that it engaged Mr Dearle through his company James Spencer Limited (James Spencer) to provide services for it. It says that the Authority does not have jurisdiction to hear his claim because he is not an employee.

[3] By agreement with the parties, the preliminary matter of whether Mr Dearle was an employee or a contractor of Leroy Albany is to be determined on the papers. The Authority has received submissions together with affidavits from Mr Dearle and Mr Masoud Bassamtabar, the sole director of Leroy Albany. It has also received a number of relevant documents.

The Issues

[4] The Authority needs to determine the real nature of the relationship between Mr Dearle and Leroy Hotel. In doing so as confirmed by the Supreme Court in *Bryson v Three Foot Six Limited (No 2)* it needs to determine:¹

- (a) What did the written terms of the parties' contract provide?
- (b) How did the relationship work in practice?
- (c) What does an assessment of all relevant matters in the relationship indicate?

Relevant matters include any divergences from, or supplementation of, any terms and conditions of the contract between the parties, aspects of control and integration and whether Mr Dearle was effectively working on his own account?

- (d) If the finding is that Mr Dearle was not an employee, then the Authority has no jurisdiction to investigate his claims in respect to personal grievances and holiday pay.

¹ *Bryson v Three Foot Six Ltd (No 2)* [2005] ERNZ 372 (SC).

- (e) If he is an employee then the Authority does have jurisdiction to investigate the claims for personal grievances and holiday pay.

What did the written terms of the parties' contract provide?

Initial interview and offer

[5] Mr Bassamtabar stated in his affidavit that he was originally looking for a person to be employed in a general manager role.²

[6] When Mr Dearle applied for and was interviewed for the role in or about July 2019 he was offered a full time salaried position of general manager at the Hotel by email dated 27 July 2019 from Mr Bassamtabar. The email contained information about the salary, bonus and benefits, including holidays. Mr Dearle was asked to complete the employment application form after which a job description and an employment agreement would be provided.

[7] Mr Dearle responded to the offer and requested some changes. One of these was a salary of \$1,700 plus GST per week to be invoiced by Mr Dearle and paid in full weekly. He also wanted a bonus of 20% on achieving KPI's salary review January 2020 and a laptop and mobile phone and a fuel card to be provided. The email stated:

As you know I have my own company and will pay my own tax.

[8] On 28 July 2019, Mr Bassamtabar responded to Mr Dearle by email and advised amongst other matters that there was agreement to the amount of the weekly payment in Mr Dearle's offer but that such payment should be made on a monthly basis for accounting reasons.

[9] Mr Bassamtabar stated in his affidavit that he had never signed a contract to engage a company to provide the ongoing services of a general manager. He had previously engaged a manager as a contractor for opening services but said that person was a friend of his and the agreement was on a handshake.³

[10] Consistent with that, Mr Bassamtabar wrote by email to Mr Dearle on 28 July 2019 and stated that he should get agreement from his HR consultant as "we hadn't contract for our GM's in the past."

² Affidavit of Masoud Bassamtabar affirmed 2 November 2020 at [6].

³ Above n 2 at [8] and [9].

[11] On 31 July 2019, Mr Bassamtabar sent an email to Mr Dearle. It provided that as Mr Dearle had decided to work based on a management service contractor basis, there were matters that Mr Bassamtabar wanted him to confirm. The Hotel would then proceed to completing a contractor arrangement for services. These matters were:

- (a) Management fee will be due for review in new financial year (April).
- (b) Your management fee will be \$88.4K per annum and payable monthly, and paid on submission and approval of a tax invoice from you.
- (c) A bonus of 20% of the management fee per annum will be applicable subject to satisfactory achievement of the service targets.
- (d) As a contractor you will be solely responsible for independently managing all Inland Revenue, ACC and any other related compliance matters which you are subject to as a contractor.

[12] By email dated 31 July 2019, Mr Dearle replied to Mr Bassamtabar and thanked him for the email and stated “Yes this is confirmed.”

[13] Leroy Albany instructed a human resource organisation to prepare a contractor agreement (the contract) which was signed on 12 and 19 August 2019.

Parties to the agreement

[14] The contracting parties are Leroy Suites (Leroy Albany Hotels) and Andrew Dearle (James Spencer).

[15] Mr Dearle had been the sole director and a shareholder of James Spencer Limited (James Spencer). The company was incorporated on 11 December 2006 and was removed from the company register on 29 February 2012.

[16] I conclude it more likely from what was stated in the contract that Mr Dearle must have told Mr Bassamtabar the name of the company of which he had been a sole director and a shareholder. Limited or Ltd was omitted from both Leroy Albany and James Spencer in the contract.

[17] Further analysis would usually be required about who the contracting parties were.⁴ James Spencer, having been removed from the Companies Register in 2012, could not have

⁴ I note for example the obligations in the Companies Act 1993 for the use of a company name.

entered into a contract so could not be a contracting party. Such analysis is therefore unnecessary.

[18] It was not until preparation was underway for the investigation of the preliminary matter that Leroy Albany said it became aware of the removal of James Spencer from the Companies Register.

Status

[19] Clause 1.1 of the contract provides that the contractor would remain an independent self-employed contractor and not an employee.

[20] Clause 1.2 provided that the contractor shall be responsible for tax affairs and payment of ACC levies.

Services and fees

[21] The services to be provided in the contract were management services. An extended list of work was attached as schedule A. The term of the contract was for a period of 12 months.

[22] The fee was set out as \$42.50 per hour plus GST and was capped at the per annum amount. Payment was to be made within 14 days of receiving an appropriate GST invoice.

Conclusion on terms

[23] Many of the terms of the contract are consistent with the true nature of the relationship being principal and contractor. These include payment of a fee on receipt of a GST invoice. There is a requirement for the contractor to pay taxes and a liability and indemnity clause. There is also a dispute resolution clause with the first step being to resolve amicably by negotiation and failing resolution in that manner then by appointment of a mediator.

[24] Mr Greening and Ms Hudson submit that six of the clauses are more suggestive of an employment relationship. Three are those with respect to an hourly rate, the requirement to work at a specific location and the supply of equipment. It would be artificial to consider the clauses with no regard to the fact this role could have been performed by a contract of service. It was initially offered to Mr Dearle on that basis. The hourly rate is specified to be

“plus GST.” The supply of equipment clause in the contract is limited to a laptop and mobile.⁵ I accept that supply of equipment may be more usually associated with an employment relationship. There is also reference in clause 20.2 to making good any damage caused to these items. Clause 20.3 provides other than those items [laptop and mobile] any other equipment was to be provided by Mr Dearle and he was to obtain adequate insurance. Those later items are more consistent with a principal/contractor relationship. These clauses, including working at a specified location, reflect more the nature of the role rather than being strongly suggestive of employment.

[25] Clause 16 provided that Mr Dearle had been engaged to provide services on the basis of his personal attributes and it is a requirement that he personally perform the services. Mr Dearle in his affidavit deposes to his considerable international experience in excess of thirty five years in the hotel, resort and lodge industry. Wanting to contract with a person for their expertise is not inconsistent with a relationship of principal and contractor. Mr Dearle clearly had relevant experience and skills.

[26] By contrast with Mr Dearle, the employee in *Bryson v Three Foot Six (No 2)* was found to have had no relevant skills for his new position and to have required six weeks training. It was found he could not be said to have been contracting his skills.⁶ The clause about personal performance is neutral as to the true nature of the relationship. Clause 16.2 provides that if Mr Dearle was unable to perform the duties he could arrange (at his own expense) a qualified competent substitute subject to Leroy Albany’s right to reasonably reject. There was some ability to delegate.

[27] I am not satisfied that business goodwill in clause 24 stipulating that the benefit of contracts and associations remains the sole property of Leroy Albany is strongly suggestive of employment but rather a neutral factor.

[28] Mr Greening also submits that Mr Dearle was prevented from applying his skills and expertise in clause 26.1 elsewhere. I accept that an exclusive arrangement with Leroy Albany is more usual with an employment relationship and may point away from a true contracting arrangement. Clause 26.1 does permit other work to be undertaken with written consent.

⁵ Other expenses paid or items provided but not referred to in the contract will be assessed under relevant matters.

⁶ Above n 1 at 381(14).

- 26.1 Except with our written consent, while this agreement subsists, you must not set yourself up, own, operate, or otherwise engage or be involved in any private business or undertake other engagement or employment with any business that may compete in any material respect with our business, including all business related to hospitality and the provision of accommodation services

Section 6 of the Employment Relations Act 2000

[29] The material aspects of s 6 of the Employment Relations Act 2000 (the Act) are set out below.

6 Meaning of employee

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

[30] It is accepted by Mr Greening and Ms Hudson in reply submissions that the applicant's original intention was to be an independent contractor but submits that in practice the relationship operated as one of employment.

[31] The intention of the parties at the outset was to characterise the relationship as principal and contractor. The contract is an indication of the parties' intentions although under s 6(3)(b) of the Act is not to be treated as a determining matter of the true nature of the relationship.

The relationship in practice

[32] Mr Dearle started his work at Leroy Albany on 22 August 2019.

[33] Schedule A attached to the contract and headed "work description" contained broad services to be provided. These included services with respect to guest services, marketing and

sales, financial and human resource management and asset management. The main reports and controls are set out in schedule A as reporting to the “chairman/board.” Further there was to be periodical reports “daily, weekly, monthly, and quarterly and annual which will be defined by the chairman/board.”

Flexibility and autonomy

[34] There were different views in the affidavit evidence about Mr Dearle’s flexibility and autonomy in undertaking his work.

[35] Mr Dearle refers in his affidavit to the type of work he was asked to undertake and says that as soon as he started work he had very little autonomy or flexibility.⁷ He states that his job in reality was to implement Mr Bassamtabar’s directions and that he was more like an “owner’s representative” than a professional consultant/contractor. Mr Dearle provided an example in his affidavit where Mr Bassamtabar asked him to represent him in Court about a supplier issue which he refused, Mr Bassamtabar subsequently became irritated.⁸

[36] Mr Dearle referred in his affidavit to being asked to undertake a restructuring, deal with a data breach and lawyers about the landlord and power company being roles that he did not consider were in the job description.⁹ Mr Bassamtabar had a different view in his affidavit and considered those to be management duties.¹⁰

[37] Mr Bassamtabar in his affidavit did not accept the level of control as set out by Mr Dearle. He said that he was going to the Hotel once or twice a week to monitor the management results from the reports in the weekly meeting.¹¹ He deposed to his control being based on work he assigned to Mr Dearle to monitor delivery and that the “odd job” may need to be assigned. He further said that Mr Dearle refused to represent him in court because he said “I am contractor not your employee.”¹²

[38] Some emphasis was placed by Mr Dearle on the sales and marketing aspect of the role and his belief that would be a significant portion of his work. He refers to it being mentioned in the SEEK advertisement about 12 times and was a major focus at the job interview. He

⁷ Affidavit of Andrew Dearle affirmed 19 October 2020 at [3].

⁸ Above n 5 at [5].

⁹ Above n 5 at [5].

¹⁰ Above n 2 at [24] (5).

¹¹ Above n 2 at [14].

¹² Above n 2 at [24](3).

said that he discovered there was no sale and marketing budget and every expense had to go through Mr Bassamtabar.¹³

[39] Mr Bassamtabar stated in his affidavit that the role that Mr Dearle performed was not that as per his job description. He said that Mr Dearle, although instructed to undertake sales and marketing, could not deliver and that another contractor was kept on as a consultant to deal with these matters.¹⁴

[40] Clause 18.1 of the contract provides:

18.1 Service levels: Subject to the provisions of this agreement, you will perform the Services competently, promptly and diligently in accordance with industry standard and in accordance with our directions, as notified to you from time to time.

[41] Direction from time to time is contemplated by the contract. Mr Dearle's affidavit evidence indicates the concern for him was the extent of that. Some emails and WhatsApp messages provided to the Authority confirm that Mr Bassamtabar did give instructions to Mr Dearle and asked for reports and updates.

Where Mr Dearle's work was undertaken

[42] Mr Dearle contrasted his attendance at the premises with another management contractor engaged by Leroy Albany who worked primarily from home. The parties had agreed in the contract that the services would be provided at Albany Suites as the main "station" and other group properties when instructed.¹⁵ The location of where work was undertaken was not a departure from the terms of the contract.

[43] On a day to day basis Mr Dearle stated he was required to work out of Mr Bassamtabar's old office when he undertook his work.¹⁶ Mr Bassamtabar says in his affidavit that the office Mr Dearle was using was a common office and that he was only authorised to use his office when he had a meeting and needed a separate office.¹⁷ What isn't in dispute is that Mr Dearle did not have his own office. There is some basis for a conclusion that Mr Bassamtabar wasn't present on a regular basis at the Hotel if Mr Dearle was using his office on a regular basis.

¹³ Above n 5 at [4].

¹⁴ Above n 2 at [11] and 24(4).

¹⁵ Part 1 of the main terms of the independent contractor agreement read in conjunction with clause 17.

¹⁶ Above n 5 at [7].

¹⁷ Above n 2 at [19].

Equipment supplied

[44] Mr Dearle states in his affidavit that he was provided with a work laptop and mobile and that Leroy Albany paid for his phone plan and fuel costs. The provision of the work laptop and mobile was not a departure from the contract. Fuel costs had been referred to before the contract was signed. Payments made for services performed into Mr Dearle's bank account appeared to include two payments recorded as expenses although it was not clear what the expenses were.

[45] Mr Dearle was provided with business cards. He said in his affidavit that Leroy Albany took ownership of his personal phone number and it became his work number and was printed on his business cards.¹⁸ He contrasted that with another management contractor at the Hotel who had his personal number on the Leroy Albany business cards. Further that the cards promoted Mr Bassamtabar's other hotels in Sydney, Taupō and Auckland and his food business.

[46] Mr Bassamtabar in his affidavit stated that in order to protect the brand and name of the company, Mr Dearle was issued with the company email address and business cards.¹⁹ He stated that the business cards and details of other hotels is common in the hospitality industry.²⁰ Further that the other contractor also had Leroy Albany business cards and had worked from the Hotel before Mr Dearle started providing services when there was a change to working from home.²¹

[47] There is a dispute as to whether Mr Dearle was issued with a uniform.²² Mr Dearle says that he was and Mr Bassamtabar says that he was not. The contract provided for a reasonable standard of dress.²³

[48] Mr Dearle was also provided with a copy of the employee handbook by the other contractor by email dated 24 August 2019. Mr Bassamtabar says in his affidavit that this was for Mr Dearle to know what the expectations of the Hotel employees were. He said that if he

¹⁸ Above n 5 at [8].

¹⁹ Above n 2 at [18].

²⁰ Above n 2 at [24](8).

²¹ Above n 2 at [24] 11).

²² Above n 2 at [18].

²³ Above n 13 at clause 18.5.

had expected Mr Dearle to be bound by this Handbook then he would have had him sign an induction form similar to that signed by employees when it is issued to them.²⁴

Hours of work

[49] Mr Dearle says in his affidavit that working for Mr Bassamtabar was all-consuming. He stated that he was extremely demanding and would call or email at all hours and ask to meet with Mr Dearle at all hours including late at night or on the weekend.²⁵ Mr Dearle also stated that his hours were fixed between 8 – 8.30am and through to 5.30 – 6pm and he was effectively on-call 24 hours 7 days a week.²⁶

[50] Some WhatsApp messages between Mr Dearle and Mr Bassamtabar and group messages were provided as part of the applicant's documentation to support this. Mr Dearle provided a WhatsApp message dated 16 November 2019 that referred to him stating that he worked typically 65 to 75 hours per week and a response from Mr Bassamtabar that the time on the business had never been a question.

[51] Mr Bassamtabar stated in his affidavit that he could not recall any instances where Mr Dearle was at the Hotel after hours.²⁷ He said that he had no idea what actual hours Mr Dearle worked on site or away. He deposed to there being a time clock system for all employees at the beginning and end of their shifts but that this was not used by Mr Dearle and there was no expectation that he use it. He said in his affidavit that Mr Dearle was able to choose what hours of the day he would work and he denied that he was on-call 24 hours seven days a week. Further he said the contract stipulated an hourly rate and he would have expected Mr Dearle to have invoiced all the hours that he worked.²⁸ Mr Bassamtabar also deposed that he worked irregular hours and would send emails at all hours of the day and night but expected Mr Dearle to respond during normal business hours.²⁹

[52] No hours of work were stipulated in the contract.

²⁴ Above n 2 at [20].

²⁵ Above n 5 at [6].

²⁶ Above n 5 at [7].

²⁷ Above n 2 at [17].

²⁸ Above n 2 at [15] and [16].

²⁹ Above n 2 at [24] (6).

Payment

[53] The Authority has a full set of invoices issues for the material period for services provided. The invoices were all sent to Leroy Albany in the name of James Spencer Limited with no reference to Mr Dearle personally. The invoices were expressed to be for consulting services. There was no GST number on any of the invoices. The first of the invoices for the period 22 August to 5 September 2019 was the only one with a GST amount included. The amount on that invoice for GST was \$561 on a fee of \$3,740. The other invoices aside from a final invoice were for 10 days consultancy services at a daily fee of \$340.

[54] Mr Dearle stated in his affidavit that whilst James Spencer did appear on the invoices he did not use the company in any way. He said that he provided the services personally and the bank account on the invoices was his own.³⁰

[55] Mr Bassamtabar in his affidavit said that it was his understanding that Leroy Albany was paying Mr Dearle's company for the services provided. He said that he thought payment was to the bank account of James Spencer.³¹

[56] Mr Greening and Ms Hudson submit that GST was charged on only the first invoice and that was then refunded back to Leroy Albany on 11 October 2019. They refer to a document which shows a transaction on Mr Dearle's bank account for a payment to "AzamLeroySuites" of \$510 on 11 October 2019. The Authority is unable to conclude why there is a difference in the amount of GST on the invoice and that said to be refunded.

Ending of the relationship

[57] There was a theft at the Hotel in December 2019. There were some concerns raised with Mr Dearle about management of hotel staff with respect to following instructions. There were other concerns subsequently raised with Mr Dearle.

[58] Mr Dearle says that he was dismissed during a meeting on 23 December 2019. Leroy Albany says that the relationship concluded by agreement that Mr Dearle resign immediately with a payment for three weeks. Amounts along those lines were paid when Leroy Albany received an invoice in the name of James Spencer for them. Holiday pay was not paid although it was requested by Mr Dearle.

³⁰ Above n 5 at [10].

³¹ Above n 2 at [24] (9) and (10) (c).

An assessment of all relevant matters in the relationship

The legal position

[59] Guidance as to all relevant matters can be found in the Supreme Court judgment in *Bryson v Three Foot Six Limited (No. 2)*.³² It was stated in upholding the decision of the Employment Court:

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” “equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person had been effectively working on his or her account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration, and fundamental test ...

[60] The Court of Appeal in *Telecom South v Post Office Union* considered an issue of whether a manager was an employee.³³ In that case there was a document headed “Contract of Employment” that was signed by the employee and his employer. It contained terms typical of a contract of service save as for one term. That was a clause that provided for payment to the employee on a monthly contract fee plus GST on production of an invoice. It also stated that the employee would be responsible for all taxes and payment on a self-employed basis.

[61] It was found in *Telecom South* that the arrangement reached between the parties did not change the fundamental relationship of a contract of service. Sir Gordon Bisson did consider it necessary to sound a word of warning to those who introduce taxation advantages into the terms of their employment that they may have to abide by the consequence that they

³² Above n 1 at [32].

³³ *Telecom South v Post Office Union* [1992] 1 ERNZ 711 (CA).

be classed as self-employed. In doing so he referred to *Massey v Crown Life Insurance Co* and the statement set out below:³⁴

In the present case there is a perfectly genuine agreement entered into at the insistence of Mr Massey on the footing that he is “self-employed”. He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being “self-employed”, he must lie on it. He is not under a contract of service.

[62] Whilst the invoices for work undertaken by Mr Dearle were in the name of James Spencer, the company did not in fact exist. The situation is therefore distinguishable from that in the Employment Court judgment of *Davis v Canwest Radioworks Ltd*.³⁵ Nevertheless, that judgment does provide some guidance where the original relationship commenced by way of a contract.

[63] Mr Davis was a radio and television broadcaster. The parties entered into a contractual relationship where Large Productions, not CanWest, was the employer of Mr Davis. Judge Travis found that there was no question that the way in which the work was performed could have been done by way of a contract of service. However he said that was not the contract on which the relationship had been commenced and there had not been a point reached where of necessity the original relationship had to change. He said to ignore the position of the company in between Mr Davis and CanWest would be to deny its existence as a separate legal entity and amount to a lifting of the corporate veil and recasting of the arrangement to be directly between Mr Davis and CanWest.³⁶

[64] In this case even though there was no company in existence, Leroy Albany understood that there was. There was no approach made by Mr Dearle to Leroy Albany to change that understanding whilst the relationship was still on foot.

Intention of the parties

[65] There is no dispute that it was the intention of the parties to enter into a contract for services. This was at the initiative of Mr Dearle who advised after being offered employment he had his own company and would pay his own tax. He reconfirmed his intention before the

³⁴ *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 at 581.

³⁵ *Davis v Canwest Radioworks Ltd* (2007) 4 NZEIR 355.

³⁶ Above n 34 at [71].

contract was drawn up. Having analysed the terms of the contract earlier I have not found them to be significantly reflective of a contract of service. In that way the contract is distinguishable from the “contract of employment” in *Telecom South*.

Control

[66] Mr Greening and Ms Hudson submitted there was there was a large degree of control of Mr Dearle including the sales budget, the requirement for approval of expenditure and that Mr Dearle was required to devote all hours to the business of Leroy Albany. Further, the role was not what Mr Dearle was told it would be. I accept there was instruction and direction of Mr Dearle although I could not conclude he was closely supervised in the sense of Mr Bassamtabar being present at the Hotel on a regular basis. Given Mr Dearle’s position as General Manager some quality control, instruction and direction from the principal could be expected.

[67] There was a difference in view about whether the hours were fixed or flexible. There is no reference to the hours to be worked in the contract and I could not conclude with any degree of certainty that Mr Dearle had no autonomy whatsoever over when and how he performed his role. I accept as likely that there were some meetings outside of ordinary hours.

[68] The contract provided an hourly rate and whilst it was capped at a per annum amount, there was at least the possibility of invoicing for hours worked provided they were not over cap at the end of twelve months. Mr Dearle prepared and provided the invoices and on the face of it was in control of what was invoiced each fortnight. Mr Greening submits that one of the invoices is for a period that includes Labour Day and that day was paid for.

[69] Mr Bassamtabar states in his affidavit that this was not known until submissions were made and that Mr Dearle was not entitled to claim for this public holiday but the invoice was paid without question.³⁷ It is not obvious on the face of the invoice that a public holiday worked or not worked is included in the invoice for consultancy services.

[70] The fact this invoice was paid when hours worked or not worked on a public holiday were being claimed indicates less control than would be the case with employees. With employees, there are obligations under the Holidays Act 2003 for details to be kept on the

³⁷ Above n 2 at [12].

holiday and leave record of dates and payment for public holidays worked or those on which an employee did not work but for which there was an entitlement to holiday pay.³⁸ Knowledge of what happens on a public holiday is therefore required in an employment relationship.

[71] An employment relationship has reciprocal good faith obligations. These include obligations not to mislead and deceive.³⁹ A contractor does not have statutory employment obligations of good faith towards a principal in setting up and structuring arrangements for providing services. Leroy Albany appears to have simply accepted Mr Deale had a company that invoiced them for his service without looking behind that. That is more consistent with a contract for services.

[72] There are factors under this test that favour both an employment relationship and an independent contracting arrangement. The reality is that the work Mr Dearle undertook could have been performed by a contract of service and aspects of control reflect that.

Integration

[73] It was accepted that Mr Dearle was integral to the Hotel.

Fundamental test

[74] Mr Greening submits that Mr Dearle was not fundamentally in business on his own account. He submits that Mr Dearle had no time to do work for anyone else and was prevented from applying his skills and expertise anywhere else. Further, he was not GST registered, could not delegate or subcontract and did not have the opportunity to make a profit and was supplied with equipment. There was also payment on hourly rates for a set fee with no ability to increase profit.

[75] Mr Dearle represented to Leroy Albany that he had his own company and would pay his own tax. He did this in an email before the contract was drafted. On that basis Leroy Albany commenced the drafting of a contract for service. Mr Dearle then signed a contract that included the company name to the extent of James Spencer in brackets after his own and he invoiced Leroy Albany using the company name.

³⁸ Section 81 of the Holidays Act 2003.

³⁹ Section 4 of the Employment Relations Act 2000.

[76] That can be contrasted with the situation of the employee in *Bryson v Three Foot Six Limited*.⁴⁰ In that case the contract referred to as a “crew deal memo” was signed some six months after Mr Bryson took up a permanent position with the company. No evidence of mutual turning of the minds to the true nature of the relationship was therefore able to be established from the commencement of work.⁴¹ I also note that in Bryson invoices were generated by the employer and that appeared to be a device to record the hours worked.

[77] There was some ability under the contract to delegate. I accept Mr Dearle considered himself fully occupied in the role with Leroy Albany and the ability to work elsewhere with written consent was not tested during the comparatively short duration of the relationship.

[78] Counsel for Mr Dearle confirmed in an email dated 24 September 2020 that no cash reconciliation or records books existed for payments made in accordance with the invoices. Further no other entity received payment from Leroy Albany for work undertaken by Mr Dearle and that payments had been made only into his personal bank account. It was confirmed that Mr Dearle was not GST registered and returns were not submitted under his name or the name of another entity in relation to GST. It was confirmed there were no PAYE returns.

[79] The fact that James Spencer did not exist prevented it having benefits it may otherwise have had for tax purposes by a contractor arrangement. Notwithstanding, Mr Dearle obtained a tax advantage to the extent a self-employed person would. Tax was not deducted at source as it would have been for an employee. He received payment in full in accordance with the invoices rendered for his services in his bank account. It appears that no tax has been paid by Mr Dearle and if that is the case then he has had the benefit of full payment for a period. An employee would not be able to control when, and if, tax payments are made.

[80] As set out and referred to in *Telecom South* there are risks to those who want to structure a relationship to gain some tax advantage but then maintaining the relationship is something else.⁴² The contract for services in this case was freely entered into. Mr Dearle had been a company director and shareholder and he had structured matters with Leroy Albany with some thought.

⁴⁰ Above n 1.

⁴¹ Above n 1 at [9] and [10].

⁴² Above n 32.

[81] I conclude that the economic reality of the relationship is that Mr Dearle structured his business in such a way so that he could maximise any tax benefits. That favours a contract for services.

Industry Practice

[82] The Authority has limited information about industry practice for general managers of hotels and whether it is more common place for them to be employed or provide services as contractors. Given the mutual agreement at the outset of the relationship then I find industry practice of less weight in the circumstances of this case.

Conclusion

[83] The relationship between Mr Dearle and Leroy Albany could have been undertaken by way of a contract of service and was originally offered to Mr Dearle on that basis. There were elements of control in the relationship and Mr Dearle was integrated closely with Leroy Albany in his management role.

[84] A contract for services was entered into by both parties at Mr Dearle's request and that is how the relationship commenced. The parties did not readdress the intention to operate in this manner through the period between 22 August and 23 December 2019 when the relationship ended. Leroy Albany continued to be invoiced for Mr Dearle's consultancy services by James Spencer up to that point. Mr Dearle was able to obtain some tax advantages by structuring his business in this manner notwithstanding that the company he had been a director of no longer existed.

[85] For the reasons set out above the agreed intention to enter into a contract for services is not displaced by the other tests. I conclude that the true nature of the relationship was not that of employee and employer but an independent contracting arrangement, a contract for services.

[86] The finding that there was a contract for services means the Authority does not have jurisdiction to investigate and determine Mr Dearle's claims.

Costs

[87] I reserve the issue of costs. If costs cannot be resolved then Mr Gelb has until 19 March 2021 to lodge and serve submissions as to costs and Mr Greening and Ms Hudson have until 9 April 2021 taking the Easter holiday period into account to lodge and serve any submissions in reply.

Helen Doyle
Member of the Employment Relations Authority