Employment Court of New Zealand

Franix Construction Limited v Tozer [2014] NZEmpC 159 (5 September 2014)

Last Updated: 6 September 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 159

ARC 40/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FRANIX CONSTRUCTION LIMITED Plaintiff
AND	BRYCE ROBERT TOZER Defendant

Hearing:	4, 5 and 8 August 2014 (Heard at Auckland)
Appearances:	PA Swarbrick and M McGoldrick, counsel for plaintiff H Fulton, counsel for defendant
Judgment:	5 September 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This is a challenge to the preliminary determination of the Employment Relations Authority that Bryce Tozer was an employee of Franix Construction Limited (Franix) at times relevant to his personal grievance of unjustified dismissal and claims to unpaid remuneration.1 The plaintiff has elected to challenge the Authority's determination by hearing de novo.

Employment Relations Authority evidence

[2] The parties sought to rely repeatedly and very fully on evidence that witnesses had given to the Authority. This was in an effort to identify contradictions between those earlier statements of evidence given in the Authority and evidence

which was presented in the case before me.

1 *Tozer v Franix Construction Limited* [2014] NZERA Auckland 265.

[3] The best, indeed only, reliable evidence of what may have been put before the Authority were the 'witness statements' of a number of persons whose evidence the parties wished the Authority to take into account. As produced to the Court, these were unsigned and unsworn statements, what might be called 'briefs of evidence' in proceedings in this Court. The evidence before me establishes that in almost every case, however, the contents of these were explored further by the Authority Member in questioning those witnesses and, in many cases, matters which did not appear on those witness statements or were only referred to briefly, were expanded upon. There is no record of the evidence considered by the Authority, whether official or unofficial. Sometimes parties or their representatives take notes during investigation meetings but none was adduced at this hearing. An Authority Member may also take his or her own notes of the evidence and although such documents may be relevant in judicial review proceedings, they do not form part of the very limited record from the Authority's investigation on a challenge such as this. Counsel for one of the parties was also that party's representative

in the Authority but was not permitted to give evidence from the Bar to contradict a witness's account of what was or was not said in the Authority.

[4] In all the foregoing circumstances, there is little or no probative value in pursuing such alleged inconsistencies in evidence between the two bodies, at least where there is a denial by the witness about the content of what was said. As occurs in some cases, there was not any record by the Authority Member in the determination of any significant concession made by a witness. Not forgetting that this was a challenge by hearing de novo, I can only say that the Court was not assisted in determining this case by extensive references, in questions in cross- examination, to what happened in the Authority, to support arguments of evidential inconsistency.

The relevant facts

[5] The following are the facts relevant to the determination of the employment relationship issue under s 6 of the Employment Relations Act 2000 (the Act).

[6] Franix is owned and operated by David Davies. Until the falling out over these events, Messrs Davies and Tozer had been friends for more than 40 years and often socialised, including with Mr Tozer's wife, Leeanne Tozer, and more recently with Mr Davies' partner, Lynette Phillips. Messrs Davies and Tozer often discussed business and family matters between themselves.

[7] For most of his working life, Mr Tozer had been associated with his family's removals transport company, Modern Movers Limited (Modern Movers). Mr Tozer was a director of Modern Movers for many years and, over the 40 or so years of his association with that family company, gained relevant small business experience. Modern Movers is said to have engaged, at different times, staff as both employees and "owner drivers"; that is, not as employees of Modern Movers.

[8] Franix is based in Auckland and is a residential and commercial premises construction company involved in a broad range of work, including alterations, renovations, maintenance, refurbishment, carpentry, joinery, drainage, and electrical installation. At the relevant times it consisted of a core group of management or administrative staff (including Mr Davies and, more recently, Ms Phillips), together with a broader on-call workforce consisting of qualified specialist contractors whom it engaged regularly but intermittently as its needs arose.

[9] In 2011-2012 Mr Davies and Ms Phillips were looking to make a lifestyle change which would include living some distance from Auckland and decreasing their day-to-day involvement in the running of Franix. As it transpired, they purchased a rural property near Matamata and spent up to five days per week living and working there, returning to Auckland for Franix's two busiest days each week. Mr Davies continued to deal with Franix's business both electronically from Matamata and, for property inspection and quotation purposes on those two days per week, in Auckland. However, change necessitated the delegation of much of the business's day–to-day work to an office or administrative manager based at, or out of, the business's premises in the suburb of Mount Wellington.

[10] In early 2012, following the departure of Franix's previous office manager,

Mr Davies asked Mr Tozer if the latter might be interested in managing aspects of

Franix's business. Despite Mr Davies's awareness that Mr Tozer had no background in the construction industry, Mr Davies considered that Mr Tozer's general business experience would be suitable for a general managerial role at Franix. Mr Davies initiated discussions with Mr Tozer to this effect. I find that, contrary to the plaintiff's evidence, they did not deal expressly with the nature of any relationship that might be formed, although they did cover the issue of remuneration including an hourly rate and that GST would be added to this. Mr Tozer agreed to take on the general managerial role at Franix and indeed began work almost immediately after the parties agreed informally to this arrangement. It was agreed that Mr Tozer would be paid an hourly rate ($30 plus GST), which occurred for the first two weeks, but this then changed to a daily figure of $300 (plus GST).

[11] Mr Tozer's role at Franix was to oversee and administer the activities of subcontractors, manage subcontractors' charges, collate materials, handle invoices generated in relation to particular jobs being undertaken by Franix, and deal with telephone calls to and from Franix's clients. Mr Tozer performed these duties principally at Franix's office but also went to its building sites and to suppliers' premises as required. Mr Tozer's day-to-day work was in business and office management. He organised building projects, liaised with subcontractors and dealt with the important matter of invoicing customers and managing finances. Mr Tozer was under the direction of Mr Davies and was required to perform his tasks as directed by Franix. He did so by attending at Franix's office on a daily basis. Excluded from Mr Tozer's responsibilities was the task of quoting for jobs and creating reports on them. This work was undertaken by Mr Davies and by another member of the staff, Antony Mifsud-Houghton.

[12] At the outset, Mr Tozer filled in timesheets for the hours worked over the first couple of weeks and gave Franix minimal and crude invoices for amounts calculated for those hours at the rate of $30 per hour (plus GST). After the first two weeks of his involvement with Franix, however, Mr Tozer then invoiced the company weekly at the set rate of $300 per day (plus GST). These invoices were even more informal and minimalist, although they were not ever queried by Franix. It paid these invoices without question for the balance of Mr Tozer's time at Franix.

[13] Within a short time of Mr Tozer starting work, Franix had also engaged Mrs Tozer for the purpose of setting up a new initiative proposed by Mr Davies, the creation of a Licensed Building Practitioners Directory. Mrs Tozer agreed to do so and started immediately at the rate of $20 (plus GST) per hour. The Tozers rendered a combined weekly invoice to Franix. Those invoices were in the name of a company owned and operated by the Tozers primarily for the purpose of managing a rental property, Brylee Investments Limited (Brylee).

[14] Payment of the Brylee invoices was made by Franix to one of the Tozers' (or Tozer associated) three or four bank accounts which

were personal accounts either in the Tozers' joint or individual names, although one was also in the name of the Tozer Family Trust. The decision about which of the Tozers' multiple bank accounts was to be the recipient of each week's payment from Franix was made by the Tozers advising Franix, and varied depending on their various financial commitments. Franix did not question this practice and always paid as directed by Mr Tozer.

[15] Mrs Tozer's work finished at the end of 2012 by agreement because there was insufficient of it to keep her occupied. Mr Tozer continued to submit weekly invoices for $300 (plus GST) per day worked. If a week day was not worked by him (for example, on a public holiday), Mr Tozer's invoice for that week omitted reference to the non-worked day. A similar invoicing practice prevailed when he took holidays.

A written 'agreement'?

[16] The plaintiff asserts the existence of a written agreement between the parties which determined the status of their relationship. It is, however, unable to produce the original or a copy of this agreement. At best, from the plaintiff's point of view, it says that the written agreement was in a standard form (a generic copy of which was produced to the Court), one original of which it says was signed by Mr Tozer and was kept by it in an office filing cabinet from whence it has subsequently disappeared.

[17] Mr Tozer, on the other hand, denies executing this or any other form of written agreement pertaining to his work for Franix.

[18] Franix's case is that shortly after Mr Tozer began work, as just described, Mr Davies provided him with a form of Franix's generic contract developed for the engagement of tradespersons on Franix's various projects. Despite the very different nature of the work to be performed by Mr Tozer, the generic form of contract was nevertheless unmodified by Mr Davies.

[19] As the proponent of it, the plaintiff has not met the onus of establishing the existence and content of such a written agreement. Even if it had, however, the form of agreement it says Mr Tozer executed was not one appropriate to his role with Franix. This form of generic agreement was one entered into between Franix and building or associated trades subcontractors to perform building, construction, or similar work for Franix on its clients' properties. However Mr Tozer was not a building or construction subcontractor: those persons were the electricians, plumbers, painters, and similar trades who or which were engaged by Franix as required for particular projects. Mr Tozer managed Franix's corporate operations, its business premises and its business systems, largely on a full-time basis. He was, in effect, Franix's office or operations manager with delegated, and sometimes sole, control over operational aspects of its business including dealings with those subcontractors for whom that was the relevant engagement agreement.

[20] So, even if I had found for the plaintiff that Mr Tozer executed the form of agreement as the plaintiff claims, this would have had little or no relevance in determining whether he was an employee of Franix. The company accepted, albeit tacitly, that its generic form of subcontractor agreement was inapplicable to Mr Tozer's work. Its case did not press, finally, its reliance on this form of written contract.

[21] In any event, I am satisfied that it is more probable, as Mr Tozer asserts, that he was engaged on an oral form of agreement, some of the terms of which were expressed orally and others of which were ascertainable by the performance of his work for Franix.

[22] The parties' oral agreement included that the defendant would conduct those operations of Franix's business delegated to him by the company or, in the temporary absence of Mr Davies, its day-to-day operations. Mr Tozer was required to ensure that the business's yard and office in Mount Wellington were opened up no later than

7.30 am on each week day and to ensure that subcontractors who gathered there to be allocated work were despatched promptly for that purpose. Likewise, at the end of each week day, it was Mr Tozer's responsibility to ensure that the office and yard premises were secured. Although others sometimes did so, it was Mr Tozer's job to ensure this was done. In between those times, the plaintiff's expectations of Mr Tozer were flexible and, to some extent, reactive to events which arose during each day. These could include making site deliveries, repairs and maintenance (particularly to vehicles), and dealing with the myriad of inquiries and issues from customers and subcontractors. Mr Tozer's duties did not, however, include dealing with initial customer inquiries, quoting for work, or the rendering of accounts to customers. These remained the province of Mr Davies.

[23] It was agreed between the parties that these obligations would occupy Mr Tozer for about 10 hours per day on week days. The parties' initial agreement was that Mr Tozer would be paid $30 per hour (plus GST) and that he would both complete timesheets and render invoices to the plaintiff for payment. After only a short time, the parties' remuneration practice varied that express term so that while still working 10-hour days when he did work, Mr Tozer then invoiced Franix for

$300 (plus GST) for each day worked by him. For a majority of his time at Franix, Mr Tozer invoiced the company for five days' work each week ($1,500 plus GST) but on a not insignificant number of weeks, fewer than five days were invoiced for that work.

[24] It was agreed that Mr Tozer would work for Franix to allow Mr Davies and Ms Phillips to disengage from the day-to-day operations of the company, permitting them, as they did, to develop a property outside Auckland and to cut back generally on their previously constant operational involvement with the company. While Mr Davies remained in control of it and still dealt with the more significant elements of the company's business (quoting, inspecting, final invoicing and the like), much of this work was able to be carried out by him by telephone when he was some distance

away from Auckland and otherwise on those occasions when he was back in

Auckland.

Payment

[25] The method of remunerating Mr Tozer is the plaintiff's strongest indication that the nature of the parties' relationship was not one of employment. Mr Tozer prepared weekly invoices which contained a bare minimum of detail except to record that he had been engaged on Franix business for a specified number of days (up to five) at the rate of $300 per day. These invoices were principally in the name of another company (Brylee Investments) or companies owned and operated by Mr Tozer for other purposes including the ownership of rental property. After Mrs Tozer began work in a part-time capacity in Franix's office, her hours were similarly charged at an hourly rate in the same invoices as Mr Tozer submitted.

[26] Mr Tozer told Franix (if not from week to week, then frequently in the course of working for the plaintiff) the bank account details to which payments were to be made. These bank accounts, too, were in the names of a variety of Tozer entities including companies and a family trust, but not ever in Mr Tozer's personal capacity. The reason for these complex and opaque financial arrangements appears to have been a long-running dispute that appeared likely to end up in litigation between Mr Tozer and other members of his family over the affairs of another family business. Mr Tozer was very keen that those others should not be able to find out about his income. There may also have been taxation advantages to Mr Tozer in these payment arrangements.

[27] The payment by GST-inclusive invoices may be a payment system indicative of an absence of an employment relationship and pointing to an independent contractual status instead. However, irrespective of its legitimacy, the arrangement of making remuneration payments to a variety of other entities through those other entities' own bank accounts does not really indicate that Mr Tozer was an independent contractor to Franix. Rather, it tends to illustrate an intention on the part of Mr Tozer to conceal his income from others and to evade the payment of tax on it. Franix allowed the perpetuation by Mr Tozer of those schemes by

acquiescence in them, but that stance does not determine the parties' intentions about

whether Mr Tozer was to be, or was, engaged on a contract of service.

How did the contract operate in practice?

[28] As agreed with Mr Davies, Mr Tozer either opened up the Franix yard each morning or was present shortly thereafter to deal with the daily activities of the company's trades' subcontractors who met at the premises to receive instructions, uplift materials, and to liaise generally with the company about the particular jobs to which they were assigned. Mr Tozer had in fact recommended this daily task to Mr Davies before he (Mr Tozer) was taken on, to ensure that Franix was not charged for any more than necessary down time by those subcontractors.

[29] Although less importantly, at the end of each working day, Mr Tozer was frequently present to ensure that the premises were in order and secured.

[30] Between those times, generally a period of 10 hours or so, Mr Tozer was engaged principally at the office on a variety of administrative tasks affecting the business and the work being performed at customers' sites. On occasions, he would be away from the office either at those sites or at suppliers' premises (and sometimes both) to ensure continuity of work by the company's subcontractors. Although Mr Tozer did not undertake initial engagements with customers or prepare and present quotations for work to be done, he handled a range of other office and company administrative tasks, especially during those increasing and lengthy periods when Mr Davies and Ms Phillips were absent each week.

[31] Mr Tozer was not engaged "on the tools"; that is he did not undertake

building or associated work which was performed by skilled subcontractors.

[32] Franix had a fluctuating workload during Mr Tozer's time there and there were periods when there was either little to be done immediately, or Franix's work could be re-timed to suit Mr Tozer's convenience. On these occasions he undertook a range of ad hoc attendances and other work for himself. These were largely of the sort that most staff are able to fit into or around a working day, for which he did not

require express permission to be absent and about which Mr Davies was unconcerned at the time. There were also some extraordinary attendances including in relation to the family dispute and potential litigation in which Mr Tozer was involved, but my assessment of these is that they were relatively minor in the overall scheme of his working day. Further, there were times when Mr Tozer worked beyond his notional 10 hour day or at weekends, which tended to compensate for those periods during working hours when he used his time for himself.

[33] There was one matter addressed particularly in evidence which the plaintiff said indicated that Mr Tozer was in business on his own account and for his own advancement. This related to contact that he made with a building inspection franchisor known as Habit, based in Wellington, to discuss the possibility of becoming a franchisee. The plaintiff's case was that Mr Tozer did so with a view to purchasing that franchise for himself, whereas Mr Tozer said that the inquiries that he made were on behalf of Franix, even though, at that preliminary stage, he had not discussed with Mr Davies the possibility of the plaintiff entering into such a franchise arrangement. In any event, the discussions with Habit went no further. On balance, I accept Mr Tozer's evidence that these discussions were not indicative of either Mr Tozer engaging in business on his own account contemporaneously with his work for Franix, or as an alternative to working for Franix. Although he no doubt learned things about the building trade from his time at Franix, Mr Tozer's skill and experience, which might have been appropriate for the operation of a building inspection company, was probably insufficient. I accept that Mr Tozer made contact with Habit to explore the possibilities of an association between it and Franix.

[34] Such time records as Mr Tozer maintained, especially at the commencement of his engagement, were minimal at best and at the latter stages, probably non- existent. He rendered invoices consistently for 10 hour days on those days which he actually worked,

irrespective of the precise length of time worked, and these were accepted equally consistently, and without question by Franix. All invoices were calculated at the rate of $300 (plus GST) for a day's work, representing a notional 10 hours at $30 per hour as had been agreed originally between Messrs Davies and Tozer.

[35] In practice, Mr Tozer exercised considerable autonomy as to how his working days were organised and when he performed at least some of the tasks expected of him. Nevertheless, Franix retained control in the sense that he was expected to be able to commit himself completely to Franix's work for a span of about 10 hours on each day that the company was working. This was from Monday to Friday of each week but excluded public holidays. Mr Tozer had no set quantity of annual holidays, but, rather, arranged leave as and when he wished to do so and as was agreed to by Franix. This was not paid leave or otherwise apparently subject to the Holiday Act

2003 or any contractual expectation.

[36] Ultimately, Mr Davies for Franix retained the ability to direct Mr Tozer as to what he did, how and when; and the defendant was answerable to Mr Davies for the nature and quality of his work.

[37] The defendant's work was controlled by the plaintiff in a manner more consistent with employment than with a contract for services.

Integration

[38] Mr Tozer was not carrying on a business on his own account when working for Franix. His work was performed at its premises using its equipment. He was provided with a mobile phone by Franix and, on occasions, operated its appliances and equipment. He had none of his own that he used in connection with his work for Franix. Mr Tozer was provided with a Franix business card that described him as "Manager", the agreed purpose of which was to impress upon customers, suppliers, and others that he was authorised to represent Franix in his dealings with them. I am satisfied that to a reasonable outside observer of the company, Mr Tozer would have appeared to have been a senior managerial employee of the company and not an independent contractor to it in the way that its tradespeople were.

[39] In some respects this is the mirror image of the integration test and the same considerations apply to each. Mr Tozer was not able to profit from the work performed by him to any greater degree than his fixed rate of remuneration allowed. I am satisfied that, despite Mr Davies' assertions to the contrary, Franix contracted for Mr Tozer's personal services. It would not have agreed to Mr Tozer's substitution of another person of Mr Tozer's choosing to perform his work. Rather, what happened in practice, if someone was absent, was that the remaining office and managerial staff of the company covered that person's work for the period of their absence as, for example, when Mr Tozer took pre-approved holidays.

Industry practice

[40] There was no evidence about this. Although Mr Davies was insistent that he wished everyone working for Franix to be an independent contractor and not an employee, this did not extend to evidence of what happens in other similar business. Although it would have been possible technically and lawfully for Mr Tozer to have performed the work he did as an independent contractor, it was equally feasible for him to do so as an employee. That is a neutral factor in the case and nothing is added to it in respect of industry practice.

Case law

[41] Reliance on detailed factual comparisons with cases decided previously under s 6, as counsel for the plaintiff urged upon me, is misplaced and unhelpful. Application to the particular circumstances of this case of principles enunciated in such leading authorities as *Bryson v Three Foot Six Ltd*,2 together with application of the statutory test of the "real nature" of the relationship, is determinative of the case on its unique facts. In this and other cases which reach the Authority and the Court,

there will inevitably be factors which arguably point either to the existence of a

2 *Bryson v Three Foot Six* [2003] NZEmpC 164; [2003] 1 ERNZ 581 (EmpC).

contract of service or to some other contractual relationship. Deciding such cases is an exercise in determining the real nature of the relationship by evaluating and balancing the significance of those opposing considerations. In these circumstances, I do not purpose to pursue further the comparative factual analyses undertaken by counsel, particularly for Franix.

[42] Because of its reliance on the legal principles emanating from decided cases, it is appropriate to consider and address these cases. I will not examine the leading judgment of the Supreme Court in *Bryson* v *Three Foot Six Limited (No 2)*3 in respect of which counsel agreed this Court must follow, except to set out the following passage from the judgment of the Supreme Court:4

"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 the 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 has been effectively working on his or her own 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 tests. Hence the importance, stressed in TNT, of analysing the contractual rights and obligations.

[43] The first subsequent judgment of this Court is relied on by counsel is *The Chief of Defence Force v Ross-Taylor*.5 That was the case of a registered medical practitioner who worked in that capacity at the naval hospital. The engagement in that case was evidenced by a carefully drafted and carefully considered written agreement which provided expressly that the arrangement was to be a contract for services. The practitioner had previously both run her own private practice and operated as an independent locum tenens. She had conducted her own private

medical practice using the naval hospital facilities. Factually, there were a number

3 *Bryson* v *Three Foot Six Limited (No 2)* [2005] NZSC 34; [2005] ERNZ 372.

4 At [32].

5 *The Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22.

of other indicia of both the relevant contract between the parties and the working arrangements which pointed substantially against the existence of a contract of service.

[44] That judgment is clearly distinguishable on its facts from the present case and, if anything, reaffirms the judicial observation that such cases are "intensely factual" and determined accordingly.6

[45] The earlier judgment of the Court of Appeal in *Telecom South Ltd v Post Office Union (Inc)*7 was referred to in the judgment in *Ross-Taylor*. *Telecom South* supports Mr Tozer's position on the strongest argument for Franix addressing the remuneration arrangements in this case. Although the judgment in *Telecom South* preceded s 6 of the Act, it nevertheless addresses what is still a significant consideration, remuneration arrangements. Bisson J, in an observation which is

obiter, noted an express provision of the parties' contract. This provided that remuneration would be paid as a monthly contract fee (plus GST) on the production of an invoice. The employee was to be responsible for all taxes on a self-employed basis and the employer was entitled to recover Goods and Services Tax for these payments of "consultancy fees". The employer accepted no responsibility or liability for any matters concerning income or other taxes. The Judge noted that this provision had been introduced into the contract at the request of the employee on the advice of his accountant in relation to the employee's limited liability company through which the remuneration was channelled. While acknowledging that "I am satisfied that the arrangement reached between the parties as to the manner of payment of remuneration in this case did not change the fundamental relationship of

a contract of service", the Judge sounded a word of warning:8

... to those who seek to introduce taxation advantages into the terms of their employment that they may have to abide by the consequence that they be classed as self-employed and not as a worker for the purposes of s 216(2) of the Labour Relations Act 1987.

[46] I would put this case into the same category as the *Telecom South* case in that even an apparently significant indication of self-employment, such as these

6 *Singh v Eric James and Associates Limited* [2010] NZEmpC 1 at [16].

7 *Telecom South Ltd v Post Office Union (Inc)* [1991] NZCA 563; [1992] 1 NZLR 275; [1992] 1 ERNZ 711 (CA).

8 At 725.

remuneration arrangements, will not be decisive when balanced against other equally strong or stronger indicia of a contract of service as I have found and set out subsequently.

[47] Next, Ms Swarbrick relied substantially on the judgment of this Court in *Clark v Northland Hunt*.9 Counsel emphasised the comments in that case in relation to the control test that the individual was left to his own devices, enjoyed a degree of autonomy, and could come and go as he pleased. Counsel submitted that Mr Tozer in this case operated very similarly in relation to his work with Franix.

[48] To the extent that a comparison is relevant, I would assess Mr Tozer's degree of autonomy to be significantly less than that found by the Court in the *Clark* case. Nevertheless, it is potentially dangerous to compare the unique facts of one case to another in relation to one test alone and to seek to draw analogies from that. I do not consider that reliance on the factual circumstances of the *Clark* case is influential in this decision.

[49] Next, in relation to the fundamental or economic reality test, Ms Swarbrick relied on the judgment of this Court in *Downey v New Zealand Greyhound Racing Association Inc.*10 Counsel submitted that this judgment is applicable in determining the fundamental test including, in particular, in relation to payment and taxation arrangements, GST registration, exclusivity of relationship and separate business accounts. Counsel's submission is that these factors should lead the Court to conclude that Mr Tozer was indeed in business on his own account. Those facts are, however, distinguishable between the cases.

[50] Mr Tozer was not himself GST registered although his property owning company through which some of his income was paid, was so registered. His was an exclusive working relationship with Franix. Apart from the not uncommon personal projects that many staff of businesses (whether employees or self-employed contractors) have, Mr Tozer worked exclusively for Franix. He did not have his own

separate business accounts. Rather, as already noted, some of his income was

9 *Clark v Northland Hunt Inc* [2006] NZEmpC 119; (2006) 4 NZELR 23 (EmpC).

10 *Downey v New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (EmpC).

channelled through a rental property owning company and the inference is that other elements of his income were paid to a family trust and perhaps other separate legal entities.

[51] Although the initial invoices submitted by Mr Tozer to Franix included what may have been a GST number, I conclude more probably that this was Mr Tozer's own Inland Revenue identification number. Had he registered personally for GST, it is likely that that would have also been his GST number but the evidence is that he did not do so. GST numbers on subsequent invoices were for a different entity.

Decision: Section 6(2)

[52] The Court must determine the real nature of the relationship between Mr

Tozer and Franix.

[53] Despite there being some indicia pointing more to the existence of a contract for services than to a contract of service (Mr Tozer's remuneration arrangements), the preponderance of relevant considerations points towards the reality of the relationship being one of employer and employee. Even those remuneration elements appearing to favour a contract for services can be seen more as an expression of Franix's intention to divest itself of any statutory responsibility for the performance of work by Mr Tozer. From Mr Tozer's point of view, such arrangements were an attempt to minimise his taxation obligations and to conceal, if not the fact then the extent of, his income from his creditors. They were devices used by both parties, albeit for different self-interested purposes.

[54] Those are, however, consequences that are not irremediable if, as the Court has concluded, there was a relationship of employer and employee. Franix's obligations to the Commissioner of Inland Revenue for accident compensation levies and other similar employment related obligations can be enforced retrospectively against it. So, too, can taxation obligations which ought to have been incurred by Mr Tozer but were not. So although it has sometimes been said in such circumstances that parties, and in particular persons such as Mr Tozer, should have to lie in the beds

they made, the reality is that such beds can be remade and wrongs righted subsequently if an employment relationship is found to have existed.

[55] While the Court must make its own decision on this challenge by hearing de novo and the determination of the Authority will be set aside automatically by the issuing of this judgment, I have reached the same conclusion as did the Authority on this preliminary status and jurisdictional question. At the times relevant to Mr Tozer's claims against Franix, the parties had a contract of service; that is they were in an employment relationship.

[56] Although the next step is for the Authority to commence its investigation into the merits of Mr Tozer's claims, I invite the parties to reflect and consider whether continued litigation will be the best outcome for both of them. I have already noted the very longstanding friendship between Messrs Davies and Tozer. This was not only ended by this dispute, but their personal enmity has driven their involvement in this and other litigation before the Disputes Tribunal over an item of relatively modest value and which also saw a complaint made to the Police.

[57] In these circumstances, and as a prerequisite to any recommencement by the Authority of its investigation, I direct the parties to mediation or further mediation pursuant to s 188 of the Act. As counsel will advise their parties, mediation can either be undertaken with the Mediation Service of the Ministry of Business, Innovation and Employment or with a privately arranged mediator. I will leave it to counsel to advise their clients of the pros and cons of each process. Mediation should not be confined to the issue in this litigation of Mr Tozer's claims to unjustified dismissal and unpaid remuneration. Attempts at settlement should encompass the other dispute or disputes between these parties including the matter which was before the Disputes Tribunal and may now, presumably, be the subject of a claim by Franix in the Authority, in the hope that this may be able to be included in any settlement reached in mediation or directly between the parties. If that is not possible, Mr Tozer may have the period of three months from the date of this judgment to apply by memorandum for the Court to settle the amount of the costs

award to which he is entitled, with the defendant having the period of one month to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Friday 5 September 2014