# New Zealand Employment Relations Authority Decisions



## James v Sherson Willis Limited (Auckland) [2017] NZERA 4; [2017] NZERA Auckland 4 (10 January 2017)

Last Updated: 6 March 2017

**Note: Orders at paragraphs [6] and [7] of this determination prohibit publication of certain evidence**

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2017] NZERA Auckland 4
5625406

BETWEEN MICHAEL JAMES Applicant

AND SHERSON WILLIS LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Simon Lapthorne, Counsel for the Applicant

Stephen Langton, Counsel for the Respondent

Investigation Meeting: 10 and 11 October 2016

Determination: 10 January 2017

**DETERMINATION OF THE AUTHORITY**

**A. By the time Michael James ceased working for Sherson Willis**

**Limited (SWL), the real nature of his relationship with the company was as its employee. Consequently, the Authority has jurisdiction to investigate his personal grievance application.**

**B. The parties are directed to attend further mediation to consider whether they can now resolve his grievance.**

**C. Costs are reserved.**

**Employment Relationship Problem**

[1] Michael James worked for Sherson Willis Limited (SWL) from 9 June 2014 to 22 February 2016. SWL is a communication strategy agency in the business of providing public relations advice and "brand building" services to corporate clients in the private and public sectors.

[2] On 22 February 2016 SWL suspended Mr James from work he was carrying out for it. Two months later he resigned and, soon after, raised a personal grievance on the grounds that he was unjustifiably disadvantaged by his suspension. He sought remedies that included salary for the period of his suspension, holiday pay for the duration of his employment, and distress compensation. He lodged a statement of problem in the Authority but, in reply, SWL questioned whether the Authority had jurisdiction to

investigate Mr James' claims. SWL said his work was done as an independent contractor, not its employee, so he could not pursue his grievance in the Authority.

**The Authority's investigation**

[3] The Authority's investigation of this preliminary jurisdictional issue received

written and oral evidence, given under oath or affirmation, from: (i) Mr James;

(ii) Skye Pathare, who had worked for SWL from July 2013 to July 2016; (iii) SWL director and shareholder Trish Sherson;

(iv) SWL director and shareholder Rewa Willis; and

(v) Aaron Taylor, who described himself as having been an independent contractor to SWL between April 2014 and August 2016 and who, in work he did for SWL in that period, used the title of general manager.

[4] Neale Jackson, a partner of business advisory firm Korda Mentha, also provided a witness statement, later sworn as an affidavit, giving his analysis of how Mr James was paid and dealt with tax matters. His evidence, that how Mr James was paid and dealt with tax matters was consistent with standard practice for a self- employed contractor, was uncontroversial about how matters looked but did not assist with determining the substance or reality of the situation. It was not necessary to have him attend the investigation meeting and answer questions.

[5] The witnesses attending the investigation meeting answered questions from me and the parties' representatives. The representatives also provided comprehensive closing oral submissions, with written synopses, about the issue for resolution. As

permitted under s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all evidence and submissions received but has stated findings of fact and law and expressed conclusions on the real nature of the relationship between Mr James and SWL and its consequences for the Authority's jurisdiction.

**Orders prohibiting publication of certain evidence**

[6] During the Authority's investigation names of SWL's clients and some financial information about the business of SWL were disclosed in the written witness statements, the oral answers to questions asked of witnesses, and four folders of background documents provided by the parties. Under clause 10 of Schedule 2 of the Act the names of those clients and the financial information referred to is prohibited from publication, in relation to these proceedings, except for any name or financial information expressly mentioned in this determination. The order remains in place unless and until varied by the Authority or a court.

[7] On the same basis the allegations SWL made about Mr James' conduct at the time of his suspension are also prohibited from publication. Those allegations were not relevant to the jurisdictional issue. It would not be fair to him for those allegations, not yet thoroughly tested by an Authority investigation, to be part of the public record at this stage of the proceedings.

[8] In the event the Authority were to proceed with an investigation of Mr James' personal grievance application, these orders would be reviewed and varied as necessary for any subsequent determination.

**The law: the real nature of the relationship**

[9] An employee is a person employed by an employer to do any work for hire or reward under a contract of service.1 In deciding whether SWL had hired Mr James as its employee or whether SWL independently contracted with him to provide services, the Authority is directed by the Act to determine the "real nature" of the relationship.2

In doing so the Authority must "consider all relevant matters, including any matters

1 Employment Relations Act 2000, s 6(1)(a).

2 Section 6(2).

that indicate the intention of the persons" but must not treat "any statement by the persons that describes the nature of their relationship" as determining the matter.3

[10] The Supreme Court in *Bryson v Three Foot Six* summarised the factors for consideration in that assessment as including:4

- the written and oral terms of any contract (for what those terms may indicate of a common intention of the parties);
- divergences from those terms and conditions apparent from the way the relationship operated in practice;
- the way in which the parties actually behaved in implementing their contract;
- the levels of control and integration and (fundamentally) whether the contracted person was working on her or his own account; and
- industry practice (which may assist the analysis, but is of itself not determinative).

[11] While principles developed in case law guide decisions in each particular case, the Employment Court has emphasised that

the inquiry in each case is “intensely factual” and is to be determined accordingly.5 It has also cautioned against focussing too closely on how the factual details of the particular case for determination are the same as or different from those in other cases:6

Reliance on detailed factual comparisons with cases decided previously under s 6 ... 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*, 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 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.

[12] The real nature of the relationship may evolve, develop or fluctuate in a way that looked at realistically, became different from its nature at the time it was formed

3 Section 6(3).

4 *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32].

5 *Singh v Eric James and Associates Ltd* [2010] NZEmpC 1 at [16].

6 *Franix Construction v Tozer* [2014] NZEmpC 159 at [41].

or had worked subsequently.7 The Authority’s determination, ultimately, considers

the substance rather than the apparent form.

**The evidence and the witnesses**

[13] This was not a matter where the determination could be made on the basis that the evidence of one or some witnesses was more credible than that of some other witness. While the recall of various conversations by Ms Sherson and Ms Willis differed from that of Mr James, this most likely arose from differences of emphasis and perception at the time they occurred, and the lapse of time meanwhile, rather than any witness not truly describing what they understood was said or done earlier.

[14] Assessment of whether Mr James was really an employee or an independent contractor while working for SWL required a factual analysis applying the matrix of statutory and common law factors summarised in *Bryson*. As acknowledged in the parties’ closing submissions, the result for some factors could be neutral or inconclusive. Where other factors are neutral, a single inconsistent factor among the

closely analysed details of a particular relationship may then prove decisive.8

[15] The competing arguments advanced by Mr James and by SWL each faced one factor that was significantly inconsistent with what they submitted should be determined to have been the real nature of their relationship.

[16] For Mr James that factor was the monthly GST invoices he provided for the hours he worked, as he was asked to do from the second week of working for SWL, and the tax advantage he gained from doing so. Such an arrangement was typical of an independent contractor relationship. His own use of the label of ‘contractor’ or

‘subcontractor’, in some instances during his time working for SWL, also supported the view that he was aware that was the nature of the relationship. The reasons that should not, in the circumstances of his case, be considered determinative have been addressed later in this determination.

[17] For SWL, the factor significantly inconsistent with what it submitted was the correct description of the reality of the relationship was the steps taken in the latter

7 *Koia v Carlyon Holdings* [2001] NZEmpC 130; [2001] ERNZ 585 at [31] and *Brunton v Garden City Helicopters*

*Ltd* [2011] NZEmpC 29 at [42].

8 *Koia*, above n 7, at [41]-[43].

months of 2015 and early in 2016 to formally adopt and implement a different

‘business model’ for dealing with people working for SWL.

[18] From the time of setting up their agency in 2006, initially as a home-based business, Ms Sherson and Ms Willis had engaged contractors to provide the skills needed for particular projects for clients. By 2011 the business had outgrown their home offices and moved to commercial premises providing more space for their project teams to work. They continued to engage people to work for SWL on the basis that they were independent contractors. By 2015 the business outgrew those premises and moved to its current premises.

[19] From mid-2015, as Ms Sherson explained in her written evidence, SWL began to “revisit this operating model” with advice

from its accountant and an external human resources consultant. The accountant was concerned about the level of costs incurred by use of a contractor model. The business had built up consistent workflows of projects and also had some monthly retainers and fixed budget spends with key clients. SWL moved to what Ms Sherson called “a more permanent workforce”. Some people working for the business on what Ms Sherson and Ms Willis regarded as an independent contracting basis were offered employment agreements as “full time consultants”. By the time of the Authority investigation meeting, in October 2016, SWL’s business model could be described as firmly based on employing permanent staff rather than using its previous ‘contractor’ model, although some consultants needed only for a particular skill or project were still engaged as independent contractors.

[20] What was relevant in respect of dealing with Mr James’ application, and the Authority’s jurisdiction to consider it, was what those arrangements and changes meant, if anything, for the real nature of his relationship with SWL during his time working for the business up to February 2016.

[21] In January 2016 Mr James was offered the opportunity to work on a ‘salary’ basis rather than invoicing for hours worked each month. This was part of SWL’s move towards formally employing staff. Whether an employment relationship was formed in the subsequent exchanges was a fact for determination. Mr James submitted an employment relationship had, in reality, already existed from the

beginning of his work for SWL but, as an alternative argument, he said one was formally created by that stage at the latest.

[22] The difficulty for SWL – as a potentially decisive factor in this determination

– was whether its move to formal employment arrangements with people working for it demonstrated what had already become the underlying economic reality of its business.

[23] While the label SWL gave its relationship with Mr James through 2015 and into early 2016 may have been as someone contracting independently to carry out work it needed done, the reality of the volume, continuity, control and integration of that work in SWL’s business was, arguably, more consistent with someone who was an employee. On that view, its formal move from a ‘contractor’ model to an

‘employee’ model simply reflected what the nature of the work, and the relationships

developed for its performance, had already been for some time.

[24] A further element in making an assessment of the nature of the relationship formed, at its outset and during the course of work done during it, concerned the nature and experience of the parties. In carrying out its role, the Authority must generally further the object of the Act.9 Those objects including “acknowledging and addressing the inherent inequality of power in employment relationships” as well as “protecting the integrity of individual choice”.10 The requirements of those objects must, sensibly, be taken to apply when determining the question of whether or not, in reality, an employment relationship even existed.

[25] The experience and bargaining power of the parties is recognised as a relevant factor in determining the reality of employment relationships. In *Chief of Defence Force v Ross Taylor*, for example, the Employment Court looked at how the particular contracting and tax arrangements showed “the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the

arrangements they have mutually entered into”.11 In that case the Court did not accept

an argument from a doctor, who was experienced in running her own practice before contracting to provide services in a navy hospital, that she was an employee.

9 Employment Relations Act 2000, s 157(2)(d).

10 Employment Relations Act 2000, s 3(a)(ii).

11 [2010] NZEmpC 22 at [30].

[26] While the details of the formation of their relationship have been considered later in this determination, when Mr James first met Ms Sherson in May 2014 to talk about the prospect of doing some work for SWL, he had recently been made redundant from a job at another agency. After graduating with a communication studies degree, he was employed for around 18 months by an advertising agency before leaving to work for a public relations agency. He was made redundant from that position three months later when that agency lost its major client. He then worked in a café while seeking another agency role.

[27] As SWL’s counsel put to Mr James in cross examination, Mr James was “unemployed, making coffee and had limited bargaining power” when he met Ms Sherson for that discussion in May 2014.

[28] By comparison Ms Sherson was an experienced and sophisticated business person who, in a very competitive industry and along with Ms Willis, had developed a small but well-respected agency with some substantial commercial clients. In answer to questions from Mr James’ counsel however, Ms Sherson did not accept the notion that Mr James as a relatively recent graduate was more likely to be an employee, rather than setting up on his own account as a contractor. She described the premise as “disingenuous” because Mr James, while young, was a “smart, driven guy” with “business smarts”.

[29] Contrary to Ms Sherson's assessment, Mr James could not be said to have had

'equal contracting strength' of the nature referred to by the Court in the *Ross Taylor* case. There was an inherent inequality between the parties that needed to be considered in determining the reality of the nature of the relationship formed.

**The issues for resolution**

[30] Against that background the issues for resolution included the following:

(i) Were there any written or oral contractual terms agreed that indicated a common intention of Mr James and SWL about the real nature of their relationship?

(ii) What did the operation in practice and actual behaviour of Mr James and SWL reveal about the nature of their relationship, including when assessed under the common law tests that consider control, integration and the economic reality of what they did?

(iii) Was there any industry practice that suggested one arrangement was more likely than the other to have been the real nature of the relationship?

(iv) In light of conclusions reached on those issues, what was the real nature of the relationship and what should the Authority direct now happen?

**Did any written or oral contractual terms indicate a common intention?**

[31] The evidence canvassed three points or periods in time at which contractual terms might have been agreed that indicated common intentions between Mr James and SWL on whether he was working as its employee or an independent contractor:

(a) The outset of the relationship, from 9 June 2014; and/or

(b) Subsequently by the nature of the work done and his relationship with

SWL after 9 June 2014 and up to 22 February 2016; and/or

(c) By discussions in mid-January 2016.

*At the outset of the relationship*

[32] Ms Sherson arranged to meet Mr James at a café on 27 May 2014 to talk about whether he might be suitable to do some work for SWL. Someone who worked at a major SWL client recommended him to her. Ms Sherson had previously had some brief dealings with Mr James at his earlier advertising agency job.

[33] Mr James sent an email that evening thanking Ms Sherson for "the opportunity to chat" and said he looked forward "to catching up again". His expectation about work prospects was reflected in this paragraph:

I'm definitely keen to get stuck in across a mix of marketing and corporate comms. I'm also happy to pick up big or small amounts of work, depending on where and when you need resource (and of course depending on whether you think I would be a good fit for the sort of work and clients you ladies deal with).

[34] The next communication appeared to be a text message from Ms Sherson at

1.33pm on 8 June:

Hi Michael – we are so excited about you starting to do some Sherson Willising. Don't forget to send us your rate. Also Rewa and I are both in and out of meetings tomorrow morning and need to be there to get you underway/briefed. Can you come in at 2pm? TS

[35] Mr James responded with an email, at 9.27pm, bearing the subject heading

"Contract rate":

My rate is $45/hr. Let's talk about how many hours per week you think you might be able to give me and for how long tomorrow. Really looking forward to getting started! See you at 2pm.

[36] Ms Sherson responded the next morning with a message reading: "That's fine, thanks Michael. See you at 2pm."

[37] On 9 June Mr James was briefed on an assignment, preparing a proposal for a

SWL client. He reported back to Ms Willis about the assignment in a brief email on

12 June, attaching the draft proposal and ending with the following line: "Let me know what's next, if anything".

[38] Ms Sherson was sure she clearly told Mr James, during their 27 May café meeting, that SWL "worked with contractors as

needed on client projects". There was no promise of ongoing work. She said briefing him on an initial assignment was not a trial but an opportunity to see how he worked. The work was "of a standard, that we offered another piece of work".

[39] The contemporary documents confirmed Mr James' understanding of the conditional nature of what he was being asked to do. His 8 June email referred to big or small amounts of work "where and when" SWL needed and "depending on" whether Ms Sherson and Ms Willis thought he suited the work and their clients. His

12 June email to Ms Willis, sending in his first piece of work, acknowledged the contingent nature of whether he would be asked to do more by use of the phrase, "if anything".

[40] He used the phrase 'contract rate' when he provided the hourly rate he expected to be paid for his work. This supported the likelihood that Ms Sherson had mentioned a contracting arrangement when they had talked at the cafe. However, on its own, the phrase was not sufficiently unequivocal to discount as too unlikely Mr James' evidence that he was not sure if he was being offered casual or part-time work or a full-time role. The tentative nature of what he might do was confirmed when he was briefed on his first assignment on 9 June and asked about what might happen

after that. He said he was told "we'll see how things go" and "we'll take it from there".

[41] His evidence was consistent with that of Ms Sherson in the sense that there was no initial promise of ongoing or full time work. Mr James' 8 June email confirmed nothing so certain was said to him by that time. However, equally, the evidence did not clearly establish a mutual intention that any work Mr James did for SWL was to be on a contracting basis rather than as casual employment.

[42] SWL suggested, unpersuasively, that the rate of $45 an hour must have been understood as indicating an independent contractor relationship as it was too high for an employee at Mr James' junior level. The rate was about twice what Mr James got in his previous job, although it was not clear SWL knew that. His evidence was that he asked for that rate because he expected to get more as he moved jobs. The rate he was paid was also only a little over one third of the rate that SWL charged its clients for his work, so it was not inconceivable that such a rate could be paid to an employee. And, on Mr James' evidence, it was significantly less than the hourly rate he was paid as an employee in the job he got after leaving SWL.

[43] SWL submitted only two terms were agreed at the outset – that Mr James would work 'as needed' and he would paid $45 an hour. The evidence of both Mr James, as seen in his 8 June email, and of Ms Sherson supported that submission.

[44] However, the evidence of neither person sufficiently established any shared intention that the work done at that rate was necessarily to be done as a contractor or as an employee. Ms Sherson, given the history of how SWL had operated its business, clearly intended the former. Mr James intended to take what work he could get but had no idea of how much that might be or how long it might last. At best, it was equivocal as to whether he had expected anything more or different than casual employment, although he hoped for something more. In his relatively brief working experience in agencies, he had worked as an employee and there was nothing, at that point, that indicated to the necessary evidential level that he expected or intended anything different in whatever work he got to do for SWL.

*From the work done after 9 June 2014 and up to February 2016*

[45] While the arrangements made for performance of the first assignment Mr James started on 9 June and finished on 12 June may have been equivocal, the circumstances arguably changed from 16 June onwards.

[46] From 16 June 2014 Mr James worked continuously for SWL until he was suspended in February 2016. Apart from weeks in which he was away sick or on leave, the hours he worked and was paid for by SWL were typically 40 or more each week. There was, in the latter months of that period, a dispute over whether he was bolstering his total pay by recording too many hours for internal or administrative work. SWL expected most of the hours worked could be charged to client accounts and projects.

[47] Throughout the time Mr James worked for SWL there was no express written agreement between the parties setting out the basis or terms on which his work was being performed. There was no employment agreement. There was no written contract for services to be provided as an independent contractor.

[48] What Mr James and SWL's directors did and said during those 18 or so months needed to be examined closely for whether it might reveal some terms agreed orally that demonstrated a common intention about the nature of the relationship.

[49] The evidence of Ms Sherson and Ms Willis, broadly paraphrased, was that Mr James worked on a series of overlapping projects and assignments. Each project or assignment was said to be a discrete piece of work which he was offered and accepted as a contractor. There was no evidence establishing that was done in any formal or express way. Rather Mr James, tacitly, accepted that he would turn up for work at SWL's offices and do what was he was asked to do on an ongoing basis while SWL, in turn, expected he would be available for work that it wanted him to do and he would do what it had arranged for him to do.

[50] There was some evidence that Mr James was asked, at least once, about which client accounts and projects he preferred to work on and he expressed his views about that. This probably resulted in some adjustment of what he was asked to do. There was one major client that he had particular experience of working for and he preferred

to work on their projects. SWL, by and large, was happy for him to do so because he had good relationships with the relevant

contact people at that client. However those logistical decisions made by the directors, about which of the people working for SWL would work on particular accounts, were simply a rational exercise made in any business to attempt to match people with areas of work that they feel enthusiastic about. The query made to him, and his response, could not be elevated to the status of an oral term that he would pick and choose which client accounts or projects he wanted to work on or that he had the supposed freedom of an independent contractor to decline work whenever he chose.

[51] However Mr James' rendering of a monthly invoice for his hours throughout the time he worked for SWL, arguably, demonstrated his agreement, and the parties' common intention, that he would be paid under an arrangement typical of an independent contractor.

[52] On 4 July 2014 Mr James provided SWL with a tax invoice setting out hours he had worked since 9 June on five pieces of work for three clients. It included a GST number and calculated what he was owed for work over a four week period based on the hourly rate of $45 plus GST. He continued to provide an invoice of that type in almost every following month until February 2016.

[53] Mr James said he started providing invoices because, after working for two weeks, he asked Ms Willis how he was to be paid and she told him to provide a tax invoice. He had no experience or knowledge of what was required but used Google to find a form which he adapted and provided. As he researched the requirements for a tax invoice, he found that income over $60,000 required he be registered for GST and he followed the steps on the IRD website to do so. He denied this indicated he had agreed to and intended to be an independent contractor.

[54] Considered objectively, the conduct of both parties confirmed their agreement that Mr James would work for SWL and be paid on an hourly rate for that work but was equivocal as to whether they had a common intention as to the nature of his relationship with SWL during that period.

*By agreement in mid-January 2016?*

[55] Mr James submitted that his existing employment relationship was "formalised" in mid-January 2016 when Mr Taylor asked if Mr James wanted to work on a 'salary' basis and Mr James confirmed that he did.

[56] The offer of a salary, rather than working on an hourly rate, was part of SWL's move to a business model using employees rather than, as it saw it, independent contractors.

[57] Mr James did not, however, agree to the salary level of $85,000 a year that Mr Taylor offered him at a meeting on 12 January. According to Mr Taylor, Mr James had said he could earn more "as a contractor". Mr James denied that account. He said he had given "a definite yes" to working 'on salary' – recognising he was an employee – and it was only the level of that salary left to be agreed. Mr Taylor had then asked him to prepare a proposal about work that he could do and why it would justify a higher salary. They met again on 29 January. In that discussion Mr James outlined his idea that he could be appointed as "head of content" for SWL and Mr Taylor told him that SWL could offer him a higher salary than suggested in their 12

January discussion.

[58] On 3 February Mr James sent Mr Taylor a written proposal for a 'head of content' role but did not refer to what salary might be provided for such a role. Mr Taylor forwarded the proposal to Ms Sherson and Ms Rewa with a covering note that referred to having met with Mr James "about a month ago to discuss remuneration". Ms Sherson sent Mr James an email that day saying she and Ms Willis would discuss his ideas when Ms Willis returned to work the following week. She ended her email with the following sentence: "We couldn't be prouder or more excited that you have chosen SW as the agency to build your future at".

[59] While SWL accepted it had offered employment to Mr James in January 2016, it submitted no employment relationship was created at that point because Mr James turned down the salary offered on the basis that he could earn more as an independent contractor. Ms Sherson's email comment of 3 February about Mr James having "chosen" SWL as the agency at which he would build his future suggested she believed, at the time, that he had made a more positive choice than that. However Mr

James' own evidence of seeking to negotiate a higher salary if he was to (at least formally) enter an employment agreement with SWL was not sufficient to establish there had been both offer and, from him, acceptance of such an arrangement. If, in reality, he was an employee of SWL that was because of the working arrangements in existence since June 2014, not because some further or different express agreement was made in January 2016.

**Operation in practice, actual behaviour and the common law tests**

[60] The general nature of the agreed terms between Mr James and SWL – that he would do all the work SWL required at the hourly rate – and the practice of paying him monthly on amounts claimed by invoice were not sufficient, in themselves, to conclude that the real nature of the relationship was one of either employment or independent contracting. Closer examination of what happened during the relationship was required under three factors identified in *Bryson* – whether different terms operated in practice, how the parties actually behaved in implementing their contract, and what the common law tests regarding control, integration and economic reality suggested was the real nature of the relationship. This section of the determination has considered those factors together as the relevant evidence overlaps.

[61] The only potentially significant divergence in practice from the tacitly agreed general terms during the course of the

relationship was a requirement from the later part of 2015 that Mr James, and others working for SWL, use timesheets on SWL's system to record their work on projects for clients. It was a requirement more typical of an employment relationship and consistent with SWL moving towards formally recognising that had become its 'business model'.

[62] In closing submissions SWL conceded Mr James was integrated into its business "to ensure a seamless client experience" and SWL had "exercised a necessary degree of control" over the way he delivered services and products for its clients. However SWL also submitted he was "not controlled at all" in respect of hours and days of work, taking time off, which assignments and client accounts he had to work on, and who else he could work for.

[63] From June 2014 to February 2016 Mr James was effectively employed full- time in his work for SWL. The evidence of Ms Sherson and Ms Willis confirmed

that, for most of the time Mr James worked for SWL, he was too busy to, realistically, have also undertaken work for anyone else.

[64] His work was closely controlled by SWL's directors in the sense that he only worked on accounts and projects to which they had assigned him. He then, sometimes, worked independently on what he was asked to do on those accounts or projects without close supervision, such as attending some meetings with contact people at client venues on his own. While such arrangements could be made with either an employee or an independent contractor who was trusted and competent, his relatively junior role and general supervision of his work by the directors and Mr Taylor was more consistent with an employment relationship.

[65] One example of supposedly flexibility in his hours, examined in detail during the Authority investigation meeting, also indicated the relationship was more akin to that of an employee. Mr James was expected to attend weekly work-in-progress (WIP) meetings. On Friday, 20 February 2015 he sent Mr Taylor, Ms Sherson and Ms Willis an email with a subject heading: "Post-polo sleep-in Monday morning". He wrote that he hoped "to be in a little later on Monday morning which means I may miss WIP". He then asked: "Let me know if any issues. I can always toughen up if required". Ms Willis responded that was "fine from my pov MJ as long as Trishie does not need you". Ms Sherson responded with a suggestion to move the WIP to Wednesday as Mr Taylor was away until then. Although Ms Sherson said, in her oral evidence, that Mr James "could come and go as he pleased" the email demonstrated his sense that he needed to ask permission. The replies of Ms Willis and Ms Sherson to his email, while accommodating, did not say that he did not have to ask.

[66] To an external observer of SWL at the time it would not have been apparent that Mr James was, on SWL's view of the arrangement, contracting independently to it. He attended client and social events as part of the SWL team. Although he used his own laptop and mobile phone, he had an SWL email address, used SWL stationery and accessed its IT support when needed. He had his own desk and landline phone at the SWL office and mostly worked there, when he was not at SWL client premises or meetings. He had a swipe card, key and alarm code for the SWL office. His evidence was that he was often first in the office and often locked up at the end of the day, after others had gone.

[67] Mr James had referred to himself as a "contractor at Sherson Willis" on his LinkedIn profile in late June 2014 but by November 2014 had changed this to "a consultant". He said he was told by Mr Taylor to use that title. In his IRD documentation when registering for GST Mr James had described himself as a "sole trader" but said that was because the only other options in the online form referred to companies and those options did not apply to him as an individual. In an email to a client in October 2014 Ms Willis had described Mr James as an "Account Manager". In an email in November 2014 Ms Willis referred to Mr James and Ms Pathare as SWL's "full-time contractors" who "don't have any other source of income". By January 2015 Mr James was referred to in external SWL presentations as a "junior consultant". When responding to a query from Ms Willis about his billing in November 2015, Mr James referred to himself as a "subcontractor". By that time the job title on Mr James' email sign off was Associate. Those various labels or statements, considered in relation to the other evidence, did not assist in determining

the real nature of the relationship.12

[68] SWL submitted Mr James' status as a contractor was not simply a consequence of SWL having labelled him as one. Rather, it submitted, Mr James "actively behaved like a contractor, especially with regards to his income, tax and GST arrangements". It said Mr James held himself out to SWL and IRD as a contractor by setting his hourly rate as $45, issuing invoices on a letterhead, registering for GST, and filing GST and income tax returns in which he claimed business expenses as a contractor and, by doing so, achieved a marginal tax rate in his first year of work of around 15 cents in the dollar.

[69] A legal principle developed in case law takes a dim view of people who seek the tax advantages of being 'self-employed' but later attempt to recast their circumstances as having been employed.13 The principle does not assist applicants found to have themselves initiated or sought the beneficial tax arrangement. However, as explained by the Employment Court in *Franix Construction Limited v*

*Tozer*, even apparently significant indications of self-employment such as payment on

12 Employment Relations Act 2000, s 6(3)(b).

13 See *Telecom South Limited v Post Office Union Inc* [1991] NZCA 563; [1992] 1 ERNZ 711 (CA) at 725 per Justice

Bisson citing *Massey v Crown Life Insurance Co* [1977] EWCA Civ 12; [1978] 2 All ER 576 at 581 per Lord Denning.

invoices initiated by an employee "will not be decisive when balanced against other

equally strong or stronger indicia of a contract of service".14

[70] In Mr James' case there was no indication he sought or initiated the invoicing arrangement. He simply did what SWL required of him. The fact that he then researched how to invoice, register for GST and claim everything he could to get the most advantage he could in his taxes was not a factor that outweighed other indicia that pointed to the real nature of his relationship with SWL being one of employment. In part his enthusiastic claiming of expenses, with its tax advantages, relied on advice he got from Mr Taylor rather than being at his own initiative.

[71] The conclusion on that point is not necessarily an easy one for either party. For Mr James it may require a reworking of his tax obligations, which could be greater as an employee rather a contractor able to deduct expenses. For SWL there may be administrative inconvenience in reworking accounts and tax records, including obligations for accident compensation levies that Mr James paid personally.

As the Court said in *Franix Construction Limited*:15

[A]lthough it has sometimes been said in such circumstances that parties ... 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.

[72] Other elements of the evidence did not support the notion that Mr James was really in business on his own account while working for SWL. Even if he were, theoretically, able to work for other agencies or clients, he was exclusively engaged in working full-time for SWL. There was no prospect he could delegate work to employees or 'subcontractors' of his own. The reality, typical of an employee, was that he could not substitute his personal service. He was not free to rearrange performance of the work he was asked to do in order to better profit from it. His only means of increasing his income was by working more hours.

[73] The economic reality was that his work for SWL, and what SWL required of

him, was indistinguishable from that of an employee, regardless of the 'independent contractor' label SWL used.

14 [2014] NZEmpC 159 at [46].

15 *Franix Construction Limited*, above n 14, at [54].

[74] It was a reality that SWL had begun steps to formally recognise by offering employment agreements to people working for it. This included Ms Pathare, who signed an employment agreement in December 2015, and Mr Taylor's discussions with Mr James in January 2016 about 'going on salary'.

**Industry practice**

[75] Evidence about industry practice could also provide a useful check in the assessment of whether Mr James was more likely than not to have been an employee or an independent contractor. There was no independent or expert evidence but Mr James and Mr Taylor each provided some relevant information in their evidence.

[76] The short point was that public relations agencies, and the wider industry of advertising or communications agencies, used both arrangements. Mr Taylor's evidence was that he had been an employee for more than 18 years before more recently becoming an independent contractor to different agencies while also working for his own clients. Mr James suggested independent contractor arrangements were more typical for senior or experienced people within the industry. His own experience after graduating and beginning work, at a junior level, was that he was an employee in advertising agency and then an employee in a public relations agency before starting work for SWL. In both those previous jobs he had a written employment agreement.

[77] However, in Mr James' case, SWL's own business experience was a more compelling indicator of the reality of the situation than the limited evidence about industry practice. At its outset SWL had legitimately used independent contractor arrangements, where particular skills were required for particular projects and particular periods. By 2015 the continuity of work and use of people on an effectively full-time and exclusive basis, integrated into and controlled by the business, meant a supposed contractor like Mr James had in reality become its employee.

**Conclusion: employee or independent contractor?**

[78] In closing submissions SWL conceded "some aspects of the performance of successive and concurrent engagements" by Mr James were consistent with an employment relationship but submitted there were "more factors, and more significant ones, which support the finding of an independent contractor relationship". For the

reasons given that submission has not been accepted in this determination. Rather the reality of relationship was one of employment, consistent with how SWL's business had developed, and not displaced by its requirement that Mr James act as if he were an independent contractor by providing invoices in order to be paid for his work.

**Direction to attend further mediation**

[79] On the basis of that determination the Authority has jurisdiction to proceed to investigate Mr James' personal grievance. Before doing so, however, it was appropriate to direct the parties to attend further mediation to consider whether they might now resolve his grievance on their own terms. The parties are directed to attend further mediation by no later than 56 days from the date of this determination. Under s 159 of the Act the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences. Meanwhile the proceedings in the Authority are suspended.

[80] If the matter is not resolved in mediation and Mr James wishes to proceed with an Authority investigation of his application he should then promptly advise the Authority. In this particular case it is likely another Authority member would investigate his grievance so that investigation would be clearly free of any impressions or preconceptions formed during the Authority's earlier investigation of whether or not an employment relationship existed.

**Costs**

[81] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they cannot, and an Authority determination on costs is needed, either party may request a timetable for the lodging of memoranda on costs. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.16

Robin Arthur

Member of the Employment Relations Authority

16 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]- [108].

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