

services to the Council for three days a week. It is common ground that this first ISA creates a relationship of contractor and principal and is not an employment agreement.

[5] Two subsequent ISAs were executed by the parties respectively on 29 October 2010 and 14 March 2011.

[6] It is the essence of Mr Parkes' claim that he signed the third agreement dated 14 March 2011 on the basis it represented a relationship between contractor and principal but that that relationship *morphed* into one of employment driven it seems by the creation of the so-call Super City in November 2010.

[7] Until November 2010, Mr Parkes' relationships were with the Auckland City Council. The constitution of the Super City in Auckland in late 2010 was effected by the amalgamation of the totality of the local authorities running districts within the Auckland conurbation.

[8] Mr Parkes argues that on and from about the date of the amalgamation, his activities became integrated within the affairs of the Auckland Council, the Council had control over his activities, that he was making decisions on behalf of the Council, and that in summary, the real nature of the relationship was one of employment. The Council resists those submissions.

[9] Mr Parkes also alleges that the Council attempted to create a position of employment for him in early 2012 and in October of that year, the Auckland Council advertised a position of employment which Mr Parkes says was effectively his position. He further says that he was told to apply for the position and did so. He also says that he was verbally told that he was appointed to the position but that nothing came of the position of employment.

[10] In effect, Mr Parkes alleges that this Council process was the Council's attempt to *formalise* the existing informal employment relationship between himself and Auckland Council.

[11] Conversely, the Council invite me to conclude that in a number of significant respects, it would not have been practicable of Auckland Council to employ Mr Parkes because amongst other things, Mr Parkes did not want to work full-time (a circumstance which was able to be accommodated in his contractual role) and Mr Parkes would require to be paid far more by way of salary than the relevant salary

band would allow. In any event, Auckland Council say that contrary to Mr Parkes' evidence there was never an affirmative decision to engage Mr Parkes in a position of employment.

Issues

[12] The only issue for determination in the present case is whether or not Mr Parkes became an employee around 2010, at the time when the Auckland Council was created from the amalgamation of the various local authorities on the Auckland isthmus.

Did Mr Parkes become an employee of the Auckland Council in 2010?

[13] I am satisfied on the application of the test required in the law, the real nature of the relationship, that Mr Parkes was never an employee of the Auckland Council.

[14] The starting point for any analysis must be the relevant statutory provision. Section 6 of the Employment Relations Act 2000 (the Act) identifies first that the Authority must determine the real nature of the relationship and then must consider *all relevant matters* including the intention of the parties but not to regard as determinative any statement by a party as to the nature of the relationship.

[15] Moreover, in the leading case *Bryson v. Three Foot Six Limited (No.2)* [2005] NZSC 34 the Supreme Court concluded that all relevant matters included the intention of the parties together with reference to the control, integration, and fundamental tests from the common law.

[16] I will adopt that structure in addressing the reasons I have reached the conclusion I do. In adopting that approach, I am doing no more than reflecting the helpful submissions provided by both of the representatives which, not surprisingly, adopt the same pattern.

[17] I turn first to consider the intention of the parties. Mr Parkes, in his submissions, quite properly makes the point that even where there is a written agreement which is apparently comprehensive, the Authority must engage in a factual inquiry in order to reach a conclusion.

[18] That said, it is a fact that each of the written contracts between the parties are plainly contracts between a contractor and his principal. Moreover, there are three of

them; that is to say, on each occasion where it was required that such a document be executed, it seems appropriate to assume that each party would have turned their minds to the nature of the provisions in the agreement which so clearly contemplate a contractual rather than an employment relationship.

[19] Amongst other things, the terms of each of those contracts provided that Mr Parkes was a contractor, that he was allowed to do work for other entities, that he had to submit invoices against which payment was made, that he was responsible for his own taxes, ACC levies and the like, and that he had to remedy any defective work without charge and could not expect to be paid when he was not available.

[20] Moreover, I am satisfied on an examination of the three contracts that the submission made by the Auckland Council, that there is nothing in any of those documents that is inconsistent with the parties' intention that Mr Parkes be a contractor, is satisfactorily made out.

[21] The Auckland Council say that there are two additional factors that I must take into account which enhance their position rather than derogate from it. The first is that although the ISAs were signed by Mr Parkes, in reality Mr Parkes provided services through a Limited Liability Company and it was the company that invoiced the Council for Mr Parkes' services.

[22] Second, Auckland Council say that, while Mr Parkes was required to provide his services for three days a week, his hours changed dependant on the availability of work from the Council for Mr Parkes on the one hand and, on the other, the availability of work for Mr Parkes from sources other than the Council.

[23] On this point, I am satisfied the evidence before me supports this contention and does not support the contrary view advanced by Mr Parkes that he was required to work a regular span of hours. Certainly, Mr Parkes' evidence is to that effect but that evidence is not consistent with the Council's evidence whose principal witness on this point was unable to be deflected from his evidence that all Auckland Council wanted was that Mr Parkes be available for three days a week and when he fitted those three days a week in was a matter entirely for him.

[24] Accordingly, I feel entitled to conclude that neither of those divergences from the strict terms of the ISA assist Mr Parkes one jot; indeed, the fact that he provided invoices and was paid through a company tends rather to confirm the contractual

arrangement as does my rejection of his claim that he had to work fixed hours and my preference for the evidence of Auckland Council to the effect that provided he satisfied the contractual minimum, he could work whatever hours he chose.

[25] The remuneration arrangements were clearly based on a contractor model. I dismiss absolutely Mr Parkes' contention that his status as a contractor was somehow based on the Auckland Council's need to *circumvent internal regulations* (para.4.15 of the applicant's submission). That particular contention, I am satisfied, was not raised at hearing and so that suggestion was never put to the Council's witnesses. It follows that there is no support for it even in Mr Parkes' evidence.

[26] With respect, nor is that submission logically consistent with Mr Parkes' evidence that he morphed into an employee because of a dramatic increase in work consequent upon the amalgamation of local authorities.

[27] The next argument advanced for Mr Parkes has more merit; it is alleged that Mr Parkes was only treated as a contractor because he could not be appropriately remunerated as an employee, this because the Council's salary banding meant that Mr Parkes' income would have been dramatically less had he been paid a salary rather than a contractual sum.

[28] But even that argument seems flawed to me; it is Mr Parkes not the Auckland Council that benefits from the contractual arrangement in the sense that Mr Parkes derives a great deal more income from being a contractor than he would be able to receive as an employee.

[29] Next, Mr Parkes made a great deal of the in house distinction between an internal contractor and an external contractor. The Auckland Council Inspections Manager for Building Control explained to me that the essential difference between an internal contractor and an external contractor was the latter did not have access to Council's internal information and facilities. It is common ground that Mr Parkes was an internal contractor but I am not satisfied that his status as an internal contractor changes the fundamental reality which is that he was one of two types of contractors, not an employee. I return to this issue later in the determination but for present purposes, do not accept that Mr Parkes emphasis on this particular status helps his case.

[30] I am satisfied on the evidence I heard that the remuneration arrangements made between Mr Parkes and the Council were consistent with a contractor relationship. I have already referred to these arrangements but note again for the sake of completeness that Mr Parkes was remunerated against an invoice generated by his company, that that company was set up as a vendor within the Council's system, that GST was charged by the service company to the Council and paid by the Council on the invoices it received from the company, that there is no provision for any of the usual incidents of employment such as sick leave or holiday leave in the invoices received by the Council, and that Mr Parkes received substantial benefit from the structure of the relationship as a contractor rather than an employee both through the tax structure available to a self-employed person on the one hand and dramatically higher remuneration than would have been the case if Mr Parkes were an employee, on the other.

[31] I am satisfied that Mr Parkes is in an unusually specialised field of fire engineer and that in consequence, it would be usual for such persons to be engaged as contractors rather than employees. Again, that is the evidence I heard from the Council and nothing I heard from Mr Parkes negated that view.

[32] Looking at the control test, and applying it to the present facts, I have already found that on the evidence I heard, Mr Parkes was required to work a minimum span of hours provided for in the contract but could work additional hours if Auckland Council work was there and he chose to do it.

[33] There is dispute between the parties about whether Mr Parkes could have chosen to work different days from the ones he actually worked which were typically Tuesday, Wednesday and Thursday. The Council's evidence is that Mr Parkes made that choice without consultation with the Council and that they were perfectly happy with that arrangement but that the arrangement was his choice rather than theirs. Certainly, on the basis of the evidence I heard, the level of flexibility that existed around this issue tended to support the conclusion that a contractual relationship was in play rather than an employment one.

[34] Moreover, both parties agree that Mr Parkes could work for other entities although as a matter of fact, that right was not extensively exercised by Mr Parkes.

[35] Of most importance in my view in applying the control test is the absence of any evidence from either party that **how** Mr Parkes worked was the subject of management and/or supervision by the Council. In effect, and quite properly, the Council left Mr Parkes to his own devices and provided that he processed the work that was given to him by the Council, they had no wish to tell him how to perform his duties. Indeed, given the specialist nature of his expertise, it is difficult to see how anyone could practically tell Mr Parkes how to perform his duties.

[36] In relation to the integration test, the Council quite properly acknowledges that there are aspects of integration apparent in the relationship between Mr Parkes and itself but they go on to contend that that does not go so far as to imply that Mr Parkes was being treated as or indeed was in fact, an employee. I agree with that assessment.

[37] It is a fact that Mr Parkes was for example subjected to performance appraisals, was included within the Council team for building consents, was given a title that might to a casual observer look like the title one might give an employee, that he used a desk, a computer system and a phone system which was provided to him by the Council and that he had a business card with the Council's logo on it.

[38] While I accept there is evidence of some integration of Mr Parkes into the Council's structure, this is inevitable given the size of the organisation and the differentiation that the Council makes between internal consultants and outside consultants.

[39] Given that Mr Parkes was an internal consultant it follows that his integration into the Council's operation was far deeper than would have been the case if he were an external contractor. To quote Mr Weight, the relevant manager for the Council:

Internal contractors are those contractors who use our internal building control information and facilities (including our check lists, policies and procedures). This means that we can readily identify those contractors who comply with our own internal standards. These contractors normally work on site, using our computer systems, as this is the only way to access our internal information.

[40] Turning now to the fundamental test at law, I am satisfied on the evidence before me that Mr Parkes was working on his own account, profiting from that work and to use the old formulation, was in a situation where he had the chance of a profit and the risk of a loss.

[41] While Mr Parkes service company's dominant client was the Auckland Council, the evidence before the Authority makes clear that he did derive other income for that service company from another client and it is apparent on that evidence that whatever the origin of the work, Mr Parkes' service company treated its clients similarly for tax purposes.

[42] Accordingly, I reject the submission made for Mr Parkes that he was effectively *paid a regular wage based on an hourly rate*. That is not the position that the evidence discloses at all. As I have already noted, the evidence discloses that Mr Parkes was, through his service company, engaging with clients in a business or contractual environment and the suggestion made on Mr Parkes' behalf that these contractual arrangements were established to meet the needs of the Council I have already rejected as being inconsistent with the evidence that I heard. Indeed, as I have already noted, all of the benefit of the arrangement in a commercial sense anyway was with Mr Parkes rather than with the Council.

[43] I turn finally to consider whether, notwithstanding the foregoing analysis, it could be said that Mr Parkes' position morphed (to use his term) from one of a contractor to a relationship of employment, about the time of the creation of the super city.

[44] The context of this argument is that Mr Parkes' work increased significantly at that time and he alleges that properly construed, the real nature of the employment, while originally one of a contractor and a principal, became a relationship of employment incrementally over time.

[45] I have not found myself able to accept that submission because it does not seem to me to be in accord with the evidence. Certainly I accept that Mr Parkes' work load increased from the creation of the super city onwards. That says nothing particularly original. The original engagement of Mr Parkes was with the Auckland City Council which was simply one of the local authorities responsible for part of the Auckland urban area. When the super city was created, of necessity, the workload for all staff and contractors of the authority, increased exponentially. But that does not mean that the fundamental relationships changed any.

[46] All that the inauguration of the super city did was increase the work available for staff and contractors of the new Auckland Council, because whereas previously, in

Mr Parkes' case anyway, he had been a contractor to the Auckland City Council, he became a contractor to the Auckland Council, the latter organisation being responsible for a much greater area and a significant and larger population.

[47] A simple increase in the volume of work which presumably applies more or less equally to every staff member and contractor of the new Auckland Council does not of itself change the fundamental legal nature of the relationship between one entity and the other. I have not been persuaded by anything Mr Parkes has put before the Authority that a mere increase in volume somehow affects his legal status. Put simply, the creation of the Auckland Council increased Mr Parkes' workload which required him to spend more hours charging time to the Auckland Council which resulted in better revenue and therefore profit for his business. What it did not do was change the legal relationship between Mr Parkes' service company and Auckland Council.

[48] It is particularly telling that Mr Parkes acknowledged to me in his evidence at my investigation meeting that he never told the Council he was not a contractor and never complained or raised with the Council the extent of the services he was providing. Why would he? The effect of the increase in volumes clearly enhanced the bottom line of his business.

[49] Nor have I been persuaded by Mr Parkes' contention that because he had a designation in the Council structure (Technical Leader (Fire) he had become something more than a mere contractor. The Council put before me a copy of the Building (Accreditation of Building Consent Authorities) Regulations 2006 which makes provision for both employees and contractors in the sort of role that Mr Parkes was in.

[50] His designation as Technical Leader (Fire) is no more and no less than an indication of his role in the Council and as he himself acknowledged during the investigation meeting reflected his particular expertise rather than being evidence of his fulfilling an employment role within the Council.

[51] The reality is that the evidence disclosed the Council had a number of internal contractors who were in an analogous position to Mr Parkes and the designation for Mr Parkes was not necessarily indicative of employment.

[52] What is more, the evidence shows that at various times Mr Parkes used the word consultant in signing off emails when acting on behalf of the Council so the lack of consistency does not help his submission either. Nor does the fact that the title which he relies upon was not introduced contemporaneously with the creation of the Auckland Council and followed some 18 months later.

[53] I now consider the creation of a possible employment position for his role, which Mr Parkes invites me to conclude is evidence of the Council's wish to formalise his de facto status as an employee.

[54] I am not satisfied that the evidence discloses anything of the sort. The facts are clear and generally undisputed. It seems that the Council were approached by the Inland Revenue Department (IRD) who had raised what Mr Weight referred to as a *general concern* about the number of contractors engaged by the Council post amalgamation. I am satisfied on the evidence I heard that that concern was not related specifically to Mr Parkes but was a general concern expressed by the IRD at the large number of persons who seemed to be engaged by the Council as contractors rather than employees.

[55] The fact that that issue should be highlighted by the IRD is hardly surprising; at amalgamation of a large local authority, a significant number of functions would have been performed temporarily because of the need to continue providing services while the new structure was being bedded down.

[56] In any event, the IRD's concern led to a Council wide review of all Auckland Council's relationships with contractors and one aspect of that was to ensure that all contractors had their own professional indemnity insurance. The evidence is that until the middle of 2012, the Council's professional indemnity insurance covered internal contractors, so on that basis, until the middle of 2012, Mr Parkes would not have been required to have independent professional indemnity insurance in respect to his work for the Council.

[57] Again, I make the observation that contrary to what Mr Parkes told me, the fact that the Council provided professional indemnity insurance until the middle of 2012 is not evidence that he was an employee unless the same argument can be advanced in respect to all of the internal contractors of Auckland Council because the

evidence is plain that the Auckland Council provided professional indemnity insurance for all internal contractors.

[58] In any event, in about June of 2012, the Council sought to encourage all internal contractors to seek their own professional indemnity insurance. Mr Parkes indicated that it was not possible for him to obtain that insurance economically because of the high risk profile associated with the work that he did.

[59] This fact led to Mr Weight the relevant manager, exploring whether the Council could recruit a full time fire engineer. Whatever the motivation for that exploration was, I am not satisfied it assists Mr Parkes because I have not been persuaded that he was a de facto employee before these events and as a matter of fact, the Council made no appointment to the role, least of all in the form of Mr Parkes. It is true that Mr Parkes was asked to apply, cooperated with the Council in the creation of the position by for example, preparing the job description, and while Mr Parkes maintains that he was told verbally that he was the best candidate or would be appointed, in fact he was not appointed and for the avoidance of doubt, I am satisfied on the evidence I heard that it was never in the Auckland Council's contemplation that he be employed because his salary expectations were approximately twice what the Council could offer (in effect the difference between what he had been paid as a contractor and what he could expect to be paid as an employee in the Council salary band) and he only wanted to work part-time.

[60] While both parties agree that Mr Parkes was the best qualified candidate I am satisfied on the evidence I heard that Mr Parkes was never appointed, and I am not persuaded by his contention that the recruitment process is in any way helpful to his claim.

[61] Mr Parkes at no stage objected to the recruitment process, willingly participated in the application and interview situation, and never suggested to the Council that this recruitment process was the Council's way of formalising his de facto status as an employee.

Determination

[62] I have not been persuaded that Mr Parkes is an employee within the meaning of the law because I consider that the real nature of the relationship between Mr Parkes and the Council was one of contractor and principal. It follows from that

conclusion and the analysis in this determination, that Mr Parkes' claim to have been unjustifiably dismissed from his employment cannot proceed because the Authority has no jurisdiction to consider the termination of a contractual relationship.

Costs

[63] Costs are reserved.

James Crichton
Member of the Employment Relations Authority