New Zealand Employment Relations Authority Decisions

Stevenson v Altus Financial Services Limited (Christchurch) [2017] NZERA 1029; [2017] NZERA Christchurch 29 (24 February 2017)

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Last Updated: 9 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 29
5627034

BETWEEN HUNTER ROY STEVENSON Applicant

A N D ALTUS FINANCIAL SERVICES LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: David Robinson and Kate Logan, Counsel for Applicant Michaela Ryan and Charlotte Carr, Counsel for Respondent

Investigation Meeting: 13 October and 20 December 2016 at Dunedin

Submissions Received: 20 December 2016 from both parties

Date of Determination: 24 February 2017

DETERMINATION OF

A. **Hunter Stevenson was in an independent contracting relationship with Altus Financial Services Limited between 26 and 29**

November 2009.

B. **Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

Employment relationship problem

[1] The Authority has been asked to determine whether Hunter Stevenson was an employee of Altus Financial Services Limited (Altus). Pursuant to s 161 of the Employment Relations Act 2000 (the Act) the Authority has exclusive jurisdiction to

make determinations about employment relationship problems including matters about whether a person is an employee – s 161 (c) of the Act.

High Court proceedings

[2] There are multi-party High Court proceedings involving Mr Stevenson and Altus.1 I shall briefly set out the matters from the proceedings that assist to put the determination whether Mr Stevenson was an employee in context.

[3] The plaintiff in the High Court proceedings is The Best Little Law House Limited (BLL). Its property was damaged by two significant Christchurch earthquakes in September 2010 and February 2011. BLL claims that the first defendant, OFS Insurance Brokers Ltd (OFS) which carries on business as insurance brokers was negligent and breached its contractual duty of care with aspects of insurance requirements. Further, BLL claim that OFS was negligent and breached its contractual duty of care in insuring with Western Pacific Insurance Limited which was placed in liquidation in April 2011. Mr Stevenson has been the sole director and shareholder of OFS since early 2014 and a director and shareholder before that time. OFS in its statement of defence denies liability and alleges Altus acted as a sub-broker and relationship manager to BLL and OFS relied on Altus to disclose any relevant information to BLL.

[4] BLL joined Altus to the proceedings as second defendant claiming that as a sub-broker it had a duty of care to carry out the terms of engagement for BLL and that it breached that duty. Altus denies that it was appointed by OFS to be a sub-broker or relationship manager in respect of OFS's brokerage with BLL.

[5] Altus issued a third party claim against Mr Stevenson. One of the causes of action was that Mr Stevenson was engaged by Altus as an independent contractor pursuant to an agreement dated 20 October 2005 and that it was outside the scope of his engagement to advise on commercial property insurance. Altus seeks an indemnity from Mr Stevenson if it is found liable to BLL. Mr Stevenson says in his statement of defence in relation to that claim that he was an employee and not an

independent contractor at the material time.

1 *The Best Little Law House Ltd v. OFS Insurance Brokers Ltd & Ors* : CIV-2013-409-1780

[6] Counsel agrees that the material time for determining the nature of the relationship between Mr Stevenson and Altus is between 26 and 29 November 2009 although the Authority heard evidence about the entire period of the relationship between Mr Stevenson and Altus including the way it ended.

[7] Mr Stevenson in his statement of problem also wanted a determination about the terms of his employment agreement and a determination that he did not breach those terms. It was agreed by counsel the Authority would only determine whether Mr Stevenson was an employee of Altus.

The issues

[8] Section 6 of the Act concerns the meaning of employee. I set out the material part below:

(1) In this Act unless the context otherwise requires, **employee** –

(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; and

(b) includes –

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who ...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[9] The Supreme Court in *Bryson v. Three Foot Six Ltd (No.2)2* referred to what all relevant matters in section 6(3)(a) of the Act means.

2 [2005] NZSC 34, [2005] ERNZ 372 at [32]

[32] "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 require the Court or Authority to have regard to features of control, integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinates 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.

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[10] The Supreme Court confirmed in *Bryson* that the Authority needs to consider the intention of the parties to the relationship. It needs to consider how the relationship operated in practice and then examine the relationship in light of features of integration and control and whether Mr Stevenson was effectively working on his own account, the fundamental test. Industry practice may assist.

[11] Mr Stevenson was a director and shareholder of Altus. The Privy Council in *Lee v Lee's Air Farming Ltd* 3 held that a governing director holding the majority of shares in a private company could still enter into a contract of service as a worker for the purpose of the legislation at that time. The context of *Lee* was a claim for compensation under insurance arrangements for employees.

[12] There has been further consideration of contracts of service with directors/shareholders in subsequent Employment Court judgments including *Smith v. Practical Plastics Ltd.4* Judge Travis in *Smith* stated that a company director is not, as such, an employee of the company but is an office holder upon appointment. However, it is clear that a director may enter into a service contract and thereby becomes an employee, and that contract may be express or implied.5

[13] In *Smith*, Judge Travis referred to a line of English authorities which suggested that there is a presumption there will be a contract of service if a director is required to

3 [1961] NZLR 325 (PC)

4 [1998] 1 ERNZ 323

5 At p.340

work full-time for the company in return for a salary.6 Judge Travis also stated at p.341 that recent English cases have held, notwithstanding *Lees*, where sufficient control to constitute an employment relationship was lacking and a director has a controlling interest, that director should not be regarded as an employee of the company.7

[14] Judge Travis concluded that the result in any particular case would depend upon its facts and there would always be points of agreement and disagreement between the various authorities. He stated that the issue is *whether, viewed as a totality, the evidence established the existence of a contract of service, whether express or implied, notwithstanding that the contracting party is a director and/or shareholder of the company*.

The incorporation of Altus

[15] Mr Stevenson and Alistair McDonald had previously worked as AMP advisers and belonged to a co-operative trading under the name AMP Otago. They were amongst a group of advisers who established an adviser business known as Financial Services (Otago) Limited which initially traded as Otago Financial Services and then as Otago Financial Management. The advisers of Financial Services (Otago) Limited including Mr McDonald and Mr Stevenson were under contracts for service with that business. OFS, incorporated in 2000, is a separate entity to Financial Services (Otago) Limited.

[16] Mr Stevenson and Mr McDonald decided to establish Altus as a new adviser business and were both directors of Altus from the date of its incorporation on 9

March 2005 with equal 50% shareholdings. The main assets of Altus were the client registers from AMP and Financial Services (Otago) Limited sold to it by Mr Stevenson and Mr McDonald with a loan back to them which was in part converted

to shares.

[17] The relationship between Altus and OFS is potentially a key issue before the

High Court and it is enough for present purposes that I set out that Altus along with other agencies referred insurance brokerage to OFS.

6 At p.345

7 *Buchan and Ivey v Secretary of State for Employment* [1996] UKEAT 770_95_2006; [1997] IRLR 80

The contract for service and intention of the parties

[18] The Authority heard evidence from Douglas Harvie, chartered accountant and managing partner of the accounting firm Harvie Green Wyatt based in Dunedin. Harvie Green Wyatt has been the accountant for Altus since its incorporation.

[19] Mr Stevenson and Mr McDonald met with Mr Harvie on 26 August 2005 to discuss the set-up of Altus. Mr Harvie provided a written note that he had taken at that time. The top of that note by way of a simple diagram reflects that Mr Stevenson and Mr McDonald would have an independent contracting relationship with Altus. The note further records that Mr Stevenson and Mr McDonald would be paid a regular amount as a commission and would take regular payments for loan reductions. A lawyer whose name is recorded on the handwritten note was to prepare the contract for services.

[20] Contracts for service between Altus and Mr Stevenson and Mr McDonald were duly prepared. The contract for service for Mr Stevenson was signed on 20

October 2005. A shareholders agreement limited to arrangements in the event of death or permanent and total disability of Mr Stevenson or Mr McDonald was signed on the same date. A further shareholding agreement was signed on 30 November

2005.

[21] The contract for services between Altus and Mr Stevenson provided in clause

1 that it was intended to operate as a contract for services and not as a contract of service and that Mr Stevenson is an independent contractor and neither he nor any of his employees or agents are employees of Altus.

[22] Clause 2 provided that the contract would continue until terminated by either party under the termination provisions of the contract. Clause 18 referred to the termination of the contract and required one month's notice in writing to the other party or, where there has been a breach of obligations under the contract, seven days' notice.

[23] The services that were required to be provided were set out in Schedule A and involved the marketing, sale and support of AMP and AMP sourced products as advised from time to time on adviser-net.

[24] The contractor was required to comply with AMP performance standards and to hold a current practising certificate issued by AMP. The contractor agrees to effect and maintain cover under a professional indemnity insurance policy at a level and in a form approved by the principal.

[25] Remuneration was set out in Schedule B to the contract for services as

$70,000 per annum and was to be paid fortnightly by direct credit to the contractor's nominated bank account. The contractor was to be solely liable for taxes, levies, premiums and duty and attend to filing all necessary returns with appropriate authorities.

[26] The contractor agreed to indemnify the principal and AMP against any costs, liability or loss direct and indirect suffered or incurred by the principal as a result of the contractor failing to comply with the provisions of the contract.

[27] The contractor was to provide the services on site at Altus' Dunedin premises and was to be provided with reasonable access and use of records, premises, plant, equipment and all other assets owned or used by the principal.

[28] Clause 19 of the contract for services provided that no modification, variation, or waiver of the contract shall be effective and binding on either of the parties unless in writing and agreed by the parties.

[29] In his written evidence Mr Stevenson said that the contract for services establishing himself and Mr McDonald as advisers for Altus was required to be done "*swiftly*" as it was a requirement by AMP to continue operating as an AMP adviser. There was however a period of time between incorporation of Altus in March 2005 and the signing of the contract for service in October 2005 for reflection and consideration as to how the relationship between the directors/shareholders and Altus should be structured. AMP required a contract in place for advisers with their principal but the evidence supported that it was not important to AMP whether it was a contract for or of services.

[30] Mr Stevenson suggested in his written and oral evidence that he was in an employment relationship with Altus from the outset of the relationship in 2005 although the statement of problem was to the effect that the relationship changed in mid-2006 to one of employment.

[31] Mr Stevenson and Mr McDonald had been independent contractors for a significant period of time before the contract for services was entered into and they had obtained professional advice about the nature of their relationship with Altus before signing the contracts for service. It was not a situation I find of unequal bargaining power.

[32] Judge Perkins in *Downey v New Zealand Greyhound Racing Association Inc*8 stated that the nature and form of the contractual document and the opportunity to seek advice, whilst not decisive, can point to the intent and nature of the relationship being one of independent contractor.

[33] Judge Perkins referred to the distinction between the contractual document in *Downey* and that in *Bryson*. In *Bryson* the conditions were printed on the reverse side of a time card/tax invoice completed each week to secure payment. In this matter as in *Downey* there was a formal contract. I find that it was the intention of Mr Stevenson to enter into a contract for services with Altus in 2005.

[34] I will now examine how the relationship operated in practice to ascertain its real nature and whether there were any divergences from the written terms of the contract for services.

[35] It did not appear during their relationship with Altus there was a particularly clear understanding by Mr Stevenson and Mr McDonald of how the law sees the relationships of employment and that of contractors. That is not uncommon and is addressed by an application of established tests to establish the real nature of the relationship rather than how they described the relationship from time to time.

The relationship in practice

Change in taxation

[36] In 2006 Mr Stevenson and Mr McDonald took tax advice from Richard McKnight of PricewaterhouseCoopers. This advice was summarised by Mr McKnight in an email dated 18 May 2006 to both men. Mr Harvie provided a copy of the email with his evidence to the Authority. The contents of the email are expressed as a "*few*

notes to clarify the matters discussed at the Board meeting this morning".

8 (2006) 3 NZELR 501 at para 23

[37] There is reference in the email to the amount of commission paid to Mr Stevenson, Mr McDonald and another person called Ros. Mr Stevenson referred to Ros in his oral evidence as the first adviser employee of Altus in 2006 and although not a matter explored in any depth I do note her inclusion in Mr McKnight's assessment of GST paid. It was noted that Mr Stevenson, Mr McDonald and Ros would have paid GST of about $25,000 which meant individually they had paid

$16,500 more GST to IRD than was recovered by Altus. [38] Mr McKnight recommended:

Going forward I suggest that the directors receive the $70,000 part of their remuneration as a shareholder salary rather than commission. PAYE can be deducted to cover the tax.

[39] He set out that this would have the following consequences:

You will avoid a GST leakage of around $12,000 pa.

You could cancel your individual GST registrations (paying GST on the deemed disposal of any assets used in your GST activity)

The ACC premium on this income will be incurred by Altus, rather than yourselves

You will need to have Altus reimburse you for any work related expenditure, as you will not be able to claim these items in your own tax return.

[40] The other matters set out in the email from Mr McKnight were about shareholder loans and a belief of the directors that the carrying value of the AMP register and OFS shares was overstated with a write down advised to reduce the equity of Altus but to be offset by the directors subscribing for an amount of share capital. There was also reference to the directors wishing to equalise the loan accounts and a suggested method was set out as to how this could be achieved.

[41] Mr Stevenson and Mr McDonald were friends when Altus was incorporated and the evidence supported that they operated in the early years on a relatively informal basis with a level of trust in each other that reflected the nature of their relationship.

[42] Mr Stevenson said in his oral evidence about what changed after mid - 2006 that *"to be fair, in my mind, nothing changed*

about how we went about our work." Mr McDonald in his written evidence said that nothing aside from the taxation aspect

changed from the time of the signing of the contract for services and he knew they were getting a set amount each week. There was nothing in the email of Mr McKnight to support that the directors at the board meeting discussed and agreed a change in the status of their relationship with Altus to one of employment. No minutes were provided to that effect.

[43] Mr McDonald was reluctant because of his friendship with Mr Stevenson to be involved in this matter and did so on the understanding that he would otherwise be required to attend under witness summons. His oral evidence with respect to his relationship with Altus is that the *"only document was the contract for services*." Mr McDonald stated in his written evidence that he could not recall any discussion beyond the tax matters in the meeting with Mr McKnight in May 2006 which he concluded would make life easier and simpler. He could not recall any discussion about a change from independent contractors to employees.

[44] Mr Stevenson and Mr McDonald paid PAYE rather than provisional tax from in or about mid-2006. They were no longer required to be registered for GST or undertake GST returns. Payment of a salary and the deduction of PAYE continued for the duration of Mr Stevenson's relationship with Altus. The contract for services was never formally terminated and Mr Stevenson did not enter into a written employment agreement with Altus including when he was offered one in 2012.

[45] Mr Harvie in his written evidence said that the payment of PAYE was not, as Altus suggested, a matter of convenience but a considered decision based on independent advice and in all matters regarding their remuneration they have been treated as employees.

[46] Mr Harvie attached to his statement of evidence Altus financial records to record Mr Stevenson and Mr McDonald paid PAYE rather than provisional tax. He also attached employer monthly schedules and the in-house records. Mr Harvie in his written evidence referred to an Inland Revenue Department note9 that provided in a company structure employees can:

...Be paid a regular salary (at least monthly) with PAYE deducted like a regular employee if an individual employment contract exists between the

9 http://www.ird.govt.nz/business-income-tax/paying-yourself/pay-yourself.html

shareholder and the company. This salary or wage can be claimed as a

deductible expense in the company's end of year return....

[47] Some guidance about the relationship between financial and tax arrangements and considerations in s 6 of the Act is found in the Employment Court judgment in *Atkinson v Phoenix Commercial Cleaners Limited.* 10 That was a case where *Phoenix* deducted withholding tax at a set rate and Chief Judge Colgan stated that two considerations affect whether that may be indicative of status in employment law.11

The first is that the decision under s 6 of the Act determines whether someone was or was not an employee for the purpose of that person's access to employment law's statutory protections. The Chief Judge did not imagine that a decision under s 6 of the Act was determinative of tax status and stated, ..."*just as tax status cannot determine the outcome of a s 6 enquiry."*

[48] The second caveat Chief Judge Colgan stated when assessing the relevance of tax payments in s 6 applications is that the employer generally makes the decision to deduct withholding tax based on its assessment of the nature of the relationship. It was stated that that was in the nature of a subjective and potentially self-serving decision and cannot be held up as an

influential factor in an objective assessment of the real nature of the working relationship under s 6 of the Act.

[49] From the advice given by Mr McKnight to the Board paying part of the remuneration as a shareholder salary provided a benefit to Altus in reducing GST leakage and corresponding benefit to Mr Stevenson and Mr McDonald in shifting the liability for ACC levies to Altus and cancelling individual GST registrations. Objectively assessed, it was not, therefore, a unilateral decision as in *Atkinson.*

[50] I accept Mr Robinson's submission that the payment of PAYE in this matter is not a neutral factor and is a relevant part of an assessment of the real nature of the relationship. I also accept Ms Ryan's submission that taxation in this case whilst relevant is not in the circumstances of this matter to be determinative of the nature of the relationship between the parties but rather it falls to be considered together with

other factors.

10 [2015] NZEmpC 19; [2015] ERNZ 10 at para 46

11 Above at [46]

Remuneration

[51] Mr Stevenson said that he had taken a reduction to his income when Altus was incorporated but as Altus grew the company was able to pay him a much higher salary which was closer to what he had earned in his previous role. From his IR3 tax return

1 April 2012 to 31 March 2013 his gross earnings had increased to $143,744.79. Mr McDonald said in his oral evidence that the income to be paid each year was decided on cash flow, the previous year's income and projected earnings. He said that he would meet with Mr Stevenson and discuss this as a Board on an informal basis with any agreed increase to remuneration that followed paid on an equal basis.

John Lewis

[52] Mr Stevenson and Mr McDonald were joined at Altus by John Lewis in 2006. Mr Stevenson said in his written evidence that his recollection was that Mr Lewis was employed by Altus although he did not have access to Altus documentation to confirm that. He said that the subsequent advisers that they brought into Altus were all employees as well and had written employment agreements and it was an oversight that he and Mr McDonald did not get around to signing employment agreements as employees.

[53] Mr Lewis was in fact party to a signed contract for services dated 1 August

2006 some two months after the Board meeting in May 2006 with Altus when he joined the company. The contract for services was along similar lines to those signed in 2005 by Mr Stevenson and Mr McDonald. The remuneration was expressed to be a gross amount per annum payable each fortnight with commission payable. A point of difference was that Mr Lewis's contract for service had restraint of trade and non- solicitation covenants and performance targets in a schedule at the back with the latter to be finalised in a review meeting.

[54] Mr Lewis became a director of Altus on 1 April 2007 and a 20% shareholder.

Mr Lewis's written evidence was that until he signed an employment agreement in

2012 all directors/shareholders operated under contract for service agreements with Altus. Although Mr Lewis's relationship with Altus was not the focus of the investigation I did note that he appeared on an attachment to the statement of Mr Harvie, DJH-4, which was stated to be the wage records for employees April to

September 2009 and he is on the employer monthly schedule for August 2006, DJH-6, as an employee.

Leave

[55] Mr Stevenson said that he could not recall discussing leave but he had to be responsible and use common sense and no-one took advantage of the situation. There was, he said, a level of trust between him and Mr McDonald to do the right thing. He was not sure if there was a holiday/leave record in earlier years but thought there would be. Sometimes Mr Stevenson would holiday with Mr McDonald when he felt that the business could cope and in 2008 he travelled to Europe for 7 weeks. The evidence supported that whilst leave may have been discussed and was taken at a time when the business could cope it was not formally applied for until well after the material time in 2009.

Administration systems

[56] Mr Lewis said that when he became a director in 2007 the administration system at Altus was very basic but a new payroll system went online on or about

2009. Mr Lewis explained that payments to the shareholders were paid monthly and these show on payslips as shareholder allowances. In 2009 payments appear to have been fortnightly and for much of 2009 there is a regular non-taxable *shareholder allowance* showing on Mr Stevenson's payslips. Mr Stevenson also contributed to Kiwisaver. Altus made contribution on his behalf as well. The payslips for Mr Stevenson also show a holiday balance in 2009 so there may have been some recording of leave at least at that stage. Mr Lewis said that this was done automatically through the particular pay system that they were using and he was not sure of the accuracy of that record.

Work undertaken

[57] Mr Stevenson said officially he was to work 75 hours over the fortnight usually between hours of 8am to 5 pm Monday to Friday, but he would work much more than that and would often work on a Sunday. No record of hours worked was kept and it was accepted that there was a level of flexibility with hours and Mr Stevenson sometimes left early to go to his holiday home on Fridays. Mr Stevenson's evidence was that he specialised more in employee benefits and investments with some general and life insurance and Mr McDonald specialised in life and general

insurance. They both said that when required they would deal with the others client's

insurance needs.

Indemnity Insurance

[58] Mr Stevenson maintained individual professional indemnity insurance as required under the contract for services but the premiums were paid by Altus. When questioned about that he said that he assumed Altus had paid for it in 2005 as well.

It is less usual for an employee to have his or her own insurance. The evidence supported that Altus also had insurance cover for those working for it.

Work systems

[59] Mr Stevenson owned his vehicle but Altus provided a fuel card of which he had unrestricted use. He explained in his evidence that he and Mr McDonald owned their own cars which they used for work as they had a different philosophy on vehicles. Mr Stevenson liked more modern expensive vehicles and Mr McDonald did not. Otherwise Mr Stevenson said they would probably have had company vehicles as well. Mr Stevenson parked in a car park at the Altus office.

[60] Under the contract for service in clause 10 Mr Stevenson was to provide the service on site at Altus's premises and was to be provided with reasonable access to and the reasonable use of all records, premises, plant, equipment or other assets owned or used by Altus. Mr Stevenson continued to use the office in Altus and was granted access to do so and its computer, phone, support staff and he was contacted by clients at the Altus number.

Oversight of performance

[61] Mr Stevenson accepted that no one was charged with his direct oversight or supervision which he said reflected his experience in the area. He said that he performed to a very high standard and his work was reviewed by the board to the extent that it was aware of new clients he had brought in and ones he had resigned. He did not accept that he would not be scrutinised for a failure to perform and referred to a 2009 business plan that had performance targets.

[62] Mr Lewis in his oral evidence said that there was no control over Mr

Stevenson. In his written evidence he described him as "*captain of his own ship".*

Mr McDonald said in his oral evidence that Mr Stevenson "*did not like to be tied down".* In his written evidence he said that he was not surprised that Mr Stevenson did not sign the employment agreement given to him in 2012 because *"he was reluctant to have targets, performance reviews or be managed".*

Factors impacting on changing relationship with Altus

[63] Mr McDonald set out in his written evidence three matters which gradually brought about a change in how Altus functioned and why it did not resemble the company it was at the start. I accept that when the evidence is considered overall these three events assume some significance.

[64] The first matter Mr McDonald referred to was the appointment of Mr Lewis and changes in the administrative system with the online payroll system in or about

2009.

[65] The second matter was the purchase of the client base of Financial Services (Otago) Limited in May 2011. Mr Stevenson and Mr McDonald had when they left that company taken their entire client books which were sold to Altus. The purchase in 2011 was for the remainder of the client base of Financial Services (Otago) Limited. That more than tripled the client base of Altus and staff numbers increased.

[66] The third matter was the employment of a business and sale manager, Jeremy Pearse-Smith. Mr Pearse-Smith commenced his employment with Altus in July 2011 and became a director and shareholder. His evidence was that when he commenced employment notwithstanding some changes to administration, income, and business costs, Altus still looked like a co-operative of advisers rather than an integrated business entity with the advisers operating independently of each other. He said that it was apparent to him that Mr Stevenson largely made all the decisions consulting with Mr McDonald as he did. He described Mr McDonald as easy going and seemingly happy for the decisions to be made in this way.

[67] Mr Pearse-Smith said in his evidence that he wanted to introduce a new regime that would bring everyone together under clear rules and guidelines and ensure all staff, general or advisers, would be committed to the same vision of Altus going into the future. To that end he sought to introduce a common employment agreement and at the same time as this was prepared Altus's then solicitors were instructed to

draft a new shareholders agreement. He said that he could not recall *push back* at the

Board meeting when he discussed employment agreements and the rational for them.

[68] The date that the prepared employment agreement was provided to Mr Stevenson was initially unclear because the email attaching the employment agreement is undated. Mr Pearse-Smith explained that he had used the email as a word document to attach to the draft employment agreements when he distributed them to the six named individuals in the email. The evidence supported that the employment agreements were provided in December 2012. Mr Lewis and Mr McDonald signed the employment agreements that month although it had been agreed they were to be dated 1 July 2011 which was the effective date of the take-over of the client base of Financial Services (Otago) Limited.

[69] The content of the email supports Mr Pearse-Smith's view that the three directors/shareholders had contracts for service with Altus and refers to the employment agreement replacing the contracts for service currently in place and attached the existing contracts in case they wanted to refer to them. There is no evidence to support that Mr Stevenson raised an issue that he was no longer operating under the contract for service. For the other three individuals referred to in the emails the new employment agreements are described as replacing their "*existing employment contracts*."

[70] Mr Stevenson never signed an employment agreement with Altus. He said in evidence that he raised some issues about what he wanted in the employment agreement when he was provided with one in 2012 but these were never resolved. He did not see the provision of the employment agreement suggesting a different relationship with Altus but more a formalisation. Mr Pearse–Smith said that the clarification and amendments were sought by Mr Stevenson and addressed but Mr Stevenson would not sign the employment agreement because he "*saw himself as the most important person in the company and did not want to be treated like other staff."*

End of the relationship

[71] In June 2013 there was tension between Mr Stevenson and the other directors and in about August 2013 Mr Stevenson indicated that he wished to resign from Altus. A draft email circulated by Mr Pearse-Smith dated 25 August to advisers to explain this to Altus support staff appears in the bundle of exhibits accompanying Mr

Stevenson's statement of evidence at HSO346 – 347. This explains amongst other matters that Mr Stevenson has decided to reduce his involvement in Altus to fully concentrate on his role as Managing Director of OFS.

[72] Some emphasis was placed on the contents of emails and agreements after Mr Stevenson left Altus. The requirement to

determine the real nature of the relationship means these matters may be relevant but not determinative.

[73] There is an email dated 27 September 2013 from Mr Stevenson in which he asks for holiday pay. He was advised by Mr Pearse-Smith that he was not an employee. Some reliance is placed on an email from Mr McDonald to Mr Stevenson in November 2013 advising Mr Stevenson that as his employment status has changed from employee to contractor he needed to update Altus's insurance adviser Marsh.

[74] On 31 January 2014 Mr Stevenson emailed Mr McDonald stating that he could not resign as he is not an employee and that Altus has cancelled his contract for service but he has not received formal notification.

[75] Mr Stevenson entered into a subsequent contract for services dated 31 October

2013 with Altus for the servicing of a small number of his Altus clients. He negotiated out of that contract for services restrictive covenants and provided Mr McDonald with the signed contract for services in a letter dated 31 October 2013 advising that it replaced the one completed by them both in 2005. There was an agreement between Altus, OFS and Mr Stevenson for sale of Mr Stevenson's shares in Altus and the sale of Altus's shares in OFS. It was stated in that agreement that the [second] contract for services would terminate on 31 January 2014. .

[76] Before I turn to the specific tests, the evidence supports that the role of financial and insurance adviser could in all likelihood be undertaken by either an employee or an independent contractor. I have found that the parties intended to and did enter into a contract for services. There was a variation to the method of taxation from June 2006 to PAYE. The evidence supported that was as the result of advice from an accountant rather than a request from the director/shareholder to change their status to that of employment with Altus.

Control

[77] The control test as Mr Robinson and Ms Ryan submit examines the degree of control exerted over the work of the individual including what work is done and how it is done.12 The greater the degree of level of control the more likely a contract of service exits but as Ms Ryan correctly submits some elements of control are also found in contracts for service.

[78] Ms Ryan placed some reliance on the Employment Appeals Tribunal decision in *Buchan and Ivey v Secretary of State for Employment13* referred to by Judge Travis in *Smith.14* In *Buchan and Ivey15* it was found that there was no error of law by the Industrial Tribunal in the decision that both men were not employees. Mr Buchan as beneficial owner of 50% of the shares in the company was able to block any decision

by the board at a general meeting which he did not agree including his own dismissal. Mr Ivey was a director and controlling shareholder of the company which he controlled and by which he could not, unless he agreed, be dismissed.

[79] Ms Ryan refers to two shareholders agreements dated 30 November 2005 and

1 April 2007 at the time Mr Lewis became a minority shareholder. The next shareholders agreement signed in 2012 was after the material period in 2009.

[80] In the shareholders agreement dated 30 November 2005 the board of directors comprises Mr McDonald and Mr Stevenson. The elected chairperson for a term for two years was Mr Stevenson. Clause 5.4 and clause 6.2 provided that as chairperson he had primary responsibility and authority for the day to day management of Altus and conduct of its affairs in accordance with the Boards directions. Ms Ryan submits that in accordance with the November 2005 shareholding

agreement any dissatisfaction with Mr Stevenson by Mr McDonald would effectively unless agreed have resulted in the deadlock provisions being invoked and the end of the business relationship under the shareholders agreement.

[81] In the 1 April 2007 shareholders agreement signed when Mr Lewis had become a director and a minority 20% shareholder, Mr Stevenson was also elected

chairperson for a further term of 2 years.

12 *Bryson v Three Foot Six Limited* [2003] NZEmpC 164; [2003] 1 ERNZ 581

13 [1997] IRIL 80

14 N 4 above at p.10

15 Above n 13

[82] The situation with the 1 April 2007 shareholders agreement was somewhat different with a dispute. Under that agreement Mr Stevenson and Mr McDonald held

40% of the shares each. Clause 24 applied with a dispute or difference. If the difference could not be resolved by negotiation or mediation then there was to be a referral to arbitration with the arbitrator's agreement final and there was no exception for employment issues.

[83] Mr Stevenson's ability, at least between November 2005 and 1 April 2007 to prevent, unless he agreed to it, his dismissal is a factor to weigh in terms of control as this is a feature not usually found in an employment relationship. After 1 April 2007 employment was not an exception in the shareholders agreement if a difference arose.

[84] The evidence supported that Mr Stevenson was a hard worker and there was regularity about his hours of work between about 8am and 5pm Monday to Friday. Considered with the evidence overall he worked as required to accomplish what needed to be done and was not controlled in what he did or when, other than by the demands of the work itself. If he wished to leave early or come in early then that was up to him. There was no evidence to support Mr McDonald or, from 2007, Mr Lewis exerted control over Mr Stevenson in this regard. Mr Lewis said in his oral evidence that in 2006 he reported to Mr Stevenson and Mr McDonald and that he had no control over Mr Stevenson's hours or indeed Mr Stevenson. Mr Stevenson accepted that he was not supervised. Whilst I accept that flexibility could equally apply to a trusted senior employee, there was in this relationship quite limited ability to exert control over Mr Stevenson if there had been concerns about hours of work.

[85] Mr Robinson submits that Mr Stevenson could/would not change his area of insurance expertise and that the evidence supported if he had the Board would have had to take action. This is really though a neutral factor because agreement on the nature of work/service to be provided exists under a contract for services or a contract of services.

[86] I do not find that the more formal requirements for applications for leave came into place until after the material period in 2009 with Mr Pearse-Smith's evidence that formal applications for leave were not in place until 2013 at Altus. Although Mr Stevenson did not consider it was that late he did accept that Altus did not have formal leave sheets for quite some time.

[87] The evidence supported that Mr Stevenson was not subject to any type of performance based review. Mr McDonald was in a virtually identical position to Mr Stevenson. He said in his oral evidence that while the employment agreement he signed in late December 2012 had elements of performance review with targets and management before that said that there were "*not really performance reviews*". The proposed employment agreement for Mr Stevenson had key performance indicators and performance objectives. Performance targets were set out in the 2009 business plan for Altus but it was not clear to me from the evidence how they were measured. I accept Mr Pearse-Smith's evidence that there is a difference between setting targets and having the ability to assess whether they have been met. Mr Pearse-Smith wanted the employment agreements to

ensure that targets set individually rather than for the business were measured. As he put it when questioned "*he wanted to introduce rigor to the plan rather than it simply being written on paper*".

[88] Mr Stevenson said in terms of control that it was the Board and not him unilaterally who set the remuneration. Mr McDonald in his oral evidence said that he took guidance from Mr Stevenson in setting the level of remuneration. There was, I accept, some control but ultimately the income each year was determined on the financial performance of Altus and in determining remuneration there was no assessment of individual performance measures. Mr McDonald and Mr Stevenson received the same amount of remuneration reflecting more their equal shareholding in Altus than a review of salary for an employee. As Altus grew Mr Stevenson received a higher salary which was closer to what he had received in his previous role.

[89] Weighing matters overall I find that until at least the purchase of the remainder of the client base of Financial Services (Otago) Limited in 2011 with a corresponding growth in the business and the subsequent employment of Mr Pearse-Smith any controls on Mr Stevenson were really quite limited. Mr McDonald and Mr Stevenson worked together on a relatively informal basis with trust in each other and there was nothing in the evidence to support that following deduction of PAYE and Mr Lewis becoming a director and minority shareholder that changed to any significant degree. No-one supervised Mr Stevenson's work and he was not subject to performance reviews. To be required to report to anyone, I find, would have been a significant departure from how Mr Stevenson had operated. Perhaps not surprisingly in those circumstances he questioned, after being presented with an employment agreement in December 2012, about a reporting line to the business manager Mr Pearse-Smith.

[90] The control test weighs more in favour of a contract for service for the material period in November 2009 than an employment relationship.

Integration

[91] The integration test as Mr Robinson and Ms Ryan both submit concerns an assessment of whether the work performed is an integral part of the business which would be the situation under a contract of service, or whether work undertaken is not integrated into the business but is accessory to it which would reflect a contract for services.

[92] Mr Stevenson, as Mr Robinson submits, performed a fundamental role in the organisation and was paid a set amount. He used Altus's tools and equipment and had a business card and communicated on behalf of Altus. He had an Altus credit card. All those matters though were not inconsistent with the terms of the contract for service which I have found was intended to reflect the relationship. They did not change after mid-2006.

[93] Mr Stevenson describes himself as an employee in his investment adviser disclosure statements although he also stated in 2012 that he had been an employee since 2005. Altus in its disclosure statements referred to its directors as employees. Altus paid membership fees and expenses for Mr Stevenson.

[94] I accept Ms Ryan's submission that because the work in this case could have been carried out by a contractor or employee the integration test is really of less assistance than it may have been in another case. Bearing that in mind the above matters could point away from a contract for service.

Fundamental test

[95] This test is concerned with whether Mr Stevenson was effectively in business on his own account. Altus owned the client registers and income went directly to the company. Mr Robinson submits that there is no evidence, at least from mid-2006, that Mr Stevenson was engaged to perform the services as a person in business on his own account. He refers to evidence

from Mr McDonald who was in an almost identical position to Mr Stevenson as significant because after he signed an employment agreement in 2012 he said nothing changed. Mr Robinson submits there was not anything to change.

[96] Whilst nothing may have changed day to day for Mr McDonald when he signed his employment agreement in 2012, the written employment agreement imposed performance measures which were linked to salary reviews and that was new and different. There were also restrictive non-solicitation covenants for clients and employees that survived termination and provisions about termination of employment

[97] Mr Robinson submits that Mr Stevenson did not invoice Altus for his service and was paid the same amount regardless of what he did and his expenses were paid or reimbursed by Altus. It was agreed in the contract for service that a set amount would be paid but importantly Mr Stevenson could benefit from his performance because the remuneration was decided by the board comprising Mr Stevenson and Mr McDonald until 2007 on the basis of the financial performance of Altus. His fortune and the fortune of Altus were closely linked. I find that Mr Stevenson, notwithstanding the payment of set amount on a regular basis, had real ability to increase his income by his work.

[98] Mr Stevenson had taken risks in deciding to set up Altus along with Mr McDonald. He sold the registers together with Mr McDonald to Altus and took an unsecured loan back with part of those loans converted to shares.

[99] More consistent with an employment relationship than someone in business on their own account was the deduction of PAYE from mid-2006 and payment of or reimbursement of expenses. Standing back and weighing the evidence overall, including Mr McKnight's email, that change to taxation on the balance of probabilities was not brought about because of the desire or intention for Altus or Mr Stevenson and Mr McDonald to change the nature of their relationship to one of employment. It was an administrative change and convenient and advantaged Altus and Mr McDonald and Mr Stevenson, albeit in different ways. The interests of the directors/shareholders and the company were not exclusive.

[100] Mr Robinson refers me to the caution sounded in *Telecom South Ltd v Post Office Union (Inc*)16 that those who introduce taxation advantages into the terms of their employment may have to abide by the consequence that they be classed as self-employed and not as an employee. He submits the reverse position must also be true

and Altus may have to abide by the consequences of adopting PAYE. To the extent

16 [1991] NZCA 563; [1992] 1 NZLR 275, [1992] 1 ERNZ 711 (CA) at 288,725

that it could be said to be a tax advantage it was, I find, a mutual advantage not only to Altus but to Mr Stevenson and Mr McDonald. Mr McDonald and Mr Stevenson were directors and shareholders of Altus so a reduction in GST leakage to Altus would impact on any shareholder profit and dividends.

[101] Whilst I accept that Mr Stevenson may not have understood the nuances of definitions of employee and contractor he was an experienced businessman and knew by virtue of his role the importance of contracts. He knew that AMP required an agreement between advisers and their principal. No employment agreement was entered into in 2006 notwithstanding Mr Lewis was engaged on a contract for service a few months after the change to taxation and a new shareholders agreement was prepared in 2007. Mr Pearse-Smith as business manager concluded after his employment in mid-2011 that the contract for services in 2005 governed the relationship Altus had with Mr Stevenson and Mr Stevenson did not suggest that was not the case.

[102] In the above circumstances I do not regard the taxation arrangement whilst usually associated with employment as influential in determining whether Mr Stevenson was in business on his own account as it may be in another matter.

[103] The various elements under this head are fairly balanced.

Industry Practice

[104] I did not hear a great deal of evidence about this and I am not greatly assisted by application of this test.

Conclusion

[105] Mr Stevenson in 2005 I have found intended to, and did, enter into a contract for services with Altus. It was never varied or terminated. It was not a situation where it could be concluded he was in an unequal bargaining position and he had advice at the time. I find that intention to be an important and influential factor in this matter in determining the real nature of the relationship.

[106] For what I have found to be largely administrative and convenience reasons rather than an intention to change status to employment there were some changes to that contract for services in terms of taxation and payment of expenses for both Mr

McDonald and Mr Stevenson. Those changes were more reflective of an employment agreement.

[107] I find there is strength in Ms Ryan's submission that it was only after the material period had ended that Mr Stevenson's relationship with Altus became liable to change with his control diminished by new shareholders and Mr Pearse-Smith overseeing the management of the business.

[108] Mr Stevenson was recalled to give evidence at the Authority investigation meeting to respond to some evidence from Mr Pearse-Smith that he reached an agreement to lease a ground floor in or about June 2013 and a suggestion by Mr Pearse-Smith that this was undertaken single headedly which caused some tension at a board meeting. Mr Stevenson said that he had involved Mr Lewis in the decision. It was clear from the evidence that Mr Stevenson gave at that time that he regarded himself and Mr McDonald as the largest producers who had brought the clients to Altus. He referred to the two of them subsidising Mr Lewis. I find that Mr Stevenson did, as Mr McDonald said his written evidence, struggle somewhat with the growth of Altus since mid-2011 and the increased accountability from what had been a situation where he had control and autonomy.

[109] Some weight was placed on the fact that Mr Stevenson did not pursue a claim for holiday pay. Mr Stevenson suggested that his entitlement was carried over to OFS however I could not be satisfied about that at all. In any event I do not regard that as a significant matter in this case. Mr Stevenson, the evidence supported, had moved on from Altus and, as it would appear in an email sent to Mr Harvie dated 20 December

2013, was excited about the cancellation of the contract for service with no restraint and what that may open up for him.

[110] The integration test may on its face favour an employment relationship but the work could be carried out by either an employee or an independent contractor so is not as persuasive as intention and control. The fundamental test is evenly balanced.

[111] I find in conclusion when the totality of the evidence is weighed and considered that the relationship Mr Stevenson had with Altus at the material period between 26 and 29 November 2009 was in the nature of a contracting relationship and not a relationship of employment.

Determination

[112] Mr Stevenson was in an independent contracting relationship between 26 and

29 November 2009 with Altus.

Costs

[113] I reserve the issue of costs. I would encourage the parties to reach agreement bearing in mind the daily tariff in the Authority. If agreement cannot be reached then Ms Ryan is to lodge and serve submissions as to costs by 10 March 2017 and Mr Robinson by 24 March 2017.

Helen Doyle

Member of the Employment Relations Authority

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