IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 152
5331457

	BETWEEN	JANICE HELEN TAYLOR Applicant
	A N D	BARLOW JUSTICE LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Lucia Vincent, Counsel for Applicant Werner van Harselaar, Counsel for Respondent
Investigation meeting:	1 September 2011 at Dunedin
Submissions Received	14 and 26 September 2011 from Applicant 16 September 2011 from Respondent
Date of Determination:	26 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Janice Taylor commenced employment with Barlow Justice Limited (BJL) on 19 March 2003 as a registered valuer in Dunedin. She had worked for a few months for BJL in the late 1990's. BJL is a duly incorporated company having its registered office in Dunedin and carrying out the business of registered valuers and professional property analysts. One of the directors of BJL is Yang Lek Tay. The other shareholder and director of BJL, Erle Justice passed away in early 2005.

[2] During 2006 Mr Tay discussed with Ms Taylor the possibility of her becoming a shareholder and director in the company. For a number of reasons it was not until 1 April 2007 when Ms Taylor's shareholding became effective. The shareholders' agreement was not signed until later in 2007.

[3] The shareholders' agreement provided, amongst other matters, that Ms Taylor and Mr Tay would each be the directors and shareholders of BJL. The key issue

between the parties is that Mr Tay says that when Ms Taylor became a shareholder and director she was no longer an employee of BJL. Ms Taylor does not accept that there was a change to her employment at the time she became a shareholder and director and that she continued to be employed by the company.

[4] Matters came to a head when in or about September 2010, Ms Taylor made a decision to sell her shares. Ms Taylor spoke to Mr Tay and BJL's then business coach, Murray Schofield, about her decision and offered her shares in the first instance to Mr Tay. The price offered was not acceptable to Ms Taylor and the company was then valued independently. Mr Tay refused another offer to purchase the shares and counter-offered but that offer was not accepted by Ms Taylor. In October 2010 an employee of BJL, Anthony Taylor, no relation to Ms Taylor, confirmed to Ms Taylor that he wanted to purchase the shares.

[5] On 1 November 2010, Ms Taylor gave Mr Tay a letter resigning from her position as a director of BJL from 1 November 2010. She requested that any funds in her shareholder's account be paid out to her. She confirmed in her letter that Anthony Taylor had agreed to purchase her shareholding and she wished Mr Taylor and Mr Tay both well in the business partnership. Ms Taylor carried on working until 4 November 2010.

[6] On 4 November 2010 Mr Tay witnessed the signing of the shareholding agreement between Anthony Taylor and Ms Taylor. When the agreement was signed, Mr Tay gave Ms Taylor a cheque for the money in her shareholder's account and a letter advising that he would not be able to offer her a position as an employee. Ms Taylor said that it would have been nice to have had a bit more notice.

[7] Ms Taylor then went to see a solicitor who raised a personal grievance on her behalf for unjustified dismissal from employment as a registered valuer on 12 November 2010. Ms Taylor seeks the following remedies:

- A determination that she was an employee of BJL;
- A determination that she was unjustifiably dismissed;
- Compensation in the sum of $10,000;

- Reimbursement of salary short-paid for four fortnightly pay periods in the sum of $2,042.30 gross;
- Three months' lost wages less any money received over that period;
- Outstanding holiday pay and holiday pay calculated on lost wages and short-paid wages;
- Interest and costs.

[8] Two matters were raised for the first time either in the written statement of evidence of Ms Taylor or in final submissions. The first is a claim for penalties. I do not intend to deal with that claim as no action was commenced in terms of s.135 of the Employment Relations Act 2000 (the Act). The second claim is one of unjustified disadvantage because there was a unilateral reduction in Ms Taylor's salary for four salary payments. Evidence was given about this and it was referred to in submissions by both counsel. No issue was raised by Mr van Harselaar as to whether this personal grievance was raised within 90 days. This could also be seen as an action for recovery of money as the remedy sought is reimbursement. The Authority will determine this matter as to whether Ms Taylor is owed any money by way of holiday pay and/or unpaid wages.

The issues

[9] The issues for the Authority to determine are as follows:

(a) Was Ms Taylor an employee of BJL on 4 November 2010 within the meaning of s.6 of the Act? If Ms Taylor was solely a director and shareholder at that time, then the Authority does not have jurisdiction to investigate and determine her personal grievance(s);

(b) The answer to this first issue will involve consideration of the following:

(i) The legal position with respect to company directors and shareholders being employees;

(ii) What, if anything, was said about Ms Taylor's employment at the time she became a shareholder and director of BJL;

(iii) Did the shareholders' agreement and constitution refer to any change of Ms Taylor's status as an employee on becoming a shareholder and director.

(c) What was the real nature of the relationship between Ms Taylor and BJL;

(d) Was there any common intention between Ms Taylor and BJL that is capable of being ascertained;

(e) How did the relationship operate in practice;

(f) How was Ms Taylor paid and what were the taxation arrangements;

(g) What were the features of control and integration in the relationship;

(h) Did Ms Taylor effectively work on her own account;

(i) Does industry practice provide guidance;

(j) If Ms Taylor was an employee then was she dismissed and/or is there money owing to her for reason that her holiday pay/salary was reduced?

(k) If Ms Taylor is found to have been an employee of BJL and dismissed then the Authority is required to apply the test in s.103A of the Employment Relations Act 2000 as inserted on 1 December 2004 by s.38 of the Employment Relations Amendment Act No 2 2004 and determine, on an objective basis, whether BJL's actions and how BJL acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred;

(l) The Authority will then have to consider what remedies, if any, should be awarded, and whether there are issues of contribution and mitigation?

What is the legal position with respect to directors and shareholders of a limited liability company being employees?

[10] Ms Vincent and Mr van Harselaar agree in their respective submissions that an individual may have concurrent relationships of employee, director and shareholder with a limited liability company.

[11] The Privy Council in *Lee v. Lee's Air Farming Ltd* [1961] NZLR 325 confirmed that company directors and shareholders may also be employed by the company. Mr Lee in that case was a governing director and held practically all the shares in a private company. Mr Lee as well as being a governing director also piloted a plane which belonged to the company for which he was paid wages recorded in the wages book. The Privy Council held that when undertaking these duties it could not be said that he was discharging his duties as a governing director but was a worker for the purpose of the legislation that the claim was concerned with. Their Lordships found that Mr Lee had a contract of service with the company. The Privy Council considered the difficulty identified by the Court of Appeal that Mr Lee could not be both under the duty of giving orders and the duty of obeying them and said that this approach does not give effect to the circumstances that it would be the company and not the deceased that would be giving the orders. The Privy Council stated *control would remain with the company whoever might be the agent of the company to exercise it***.**

[12] The principles in *Lee* were followed by the Employment Court in *Smith v. Practical Plastics Ltd* [1998] 1 ERNZ 323. The Authority applied the principles from *Lee* in *Peter Gatenby v. Hydrotech 2006 Ltd* (unreported) AA393/08, Member Robin Arthur. The Authority in that case found that there can be concurrent relationships for an individual with a limited liability company and an individual can pursue rights as an employee arising out of the employment relationship. The Authority noted that it is only those rights that can be addressed in the employment jurisdiction and not any issues or rights that arise from any other concurrent status as a director or shareholder.

What, if anything, was said about Ms Taylor's employment at the time the shareholding became effective?

[13] The evidence supports that there was nothing discussed directly between Ms Taylor and Mr Tay about employment at the time she became a shareholder and director.

[14] Mr Tay said that he assumed that Ms Taylor would stop being an employee when she became a shareholder and director. Mr Tay said that it was envisaged that Ms Taylor would be jointly responsible with him for key decisions in the office including accounts and budget matters. He described in his written evidence the intent of the shareholders agreement to create guidelines around the sale of the shares, death or illness of the parties as this had occurred within the business with two previous shareholders and directors, John Barlow and Mr Justice.

[15] Ms Taylor, in her evidence, said that she could not recall any discussion about any change to her employment status when she became a director and shareholder. She said had there been such a discussion, then she would not have felt so shocked when her employment was terminated on 4 November 2010 after she resigned as a director and sold her shares.

[16] There is no evidence that Ms Taylor resigned as an employee or that she was dismissed at the time she became a shareholder and director in 2007.

Did the shareholders' agreement and constitution of BJL refer to any change of Ms Taylor's status as an employee on becoming a shareholder and director?

[17] Neither the shareholders' agreement nor the company's constitution addressed any matters relating to a change of employment status when a person and/or specifically Ms Taylor, became a director and shareholder of BJL.

The real nature of the relationship after Ms Taylor became a shareholder and director

[18] Section 6 of the Employment Relations Act 2000 provides the meaning of employee. In deciding whether a person is an employee or not the Authority under that section is required to determine the real nature of the relationship between the person and the employer and in doing so must consider all relevant matters including those that indicate the intentions of those in the relationship. For current purposes the relevant subsections are as follows:

6 Meaning of employee

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

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

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

(3) For the purposes of subsection (2), the Court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[19] The Supreme Court in *Bryson v Three Foot Six Limited* [2005] NZSC 34 stated at para.32

… 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.

[20] I am not satisfied in this case that any common intention by the parties about Ms Taylor's employment can be ascertained when she became a shareholder and director. In focusing on how the relationship worked in practice it is also useful to compare the relationship before and after Ms Taylor became a director and shareholder.

[21] There was no written employment agreement entered into when Ms Taylor commenced with BJL in 2003 as a registered valuer. The evidence supports it is unlikely any of the employees at BJL had a written employment agreement. Mr Schofield addressed this matter in a regular monthly meeting that he held with Ms Taylor and Mr Tay on 7 September 2010 when he discussed BJL having employment agreements for staff. It was agreed at the meeting that Ms Taylor was responsible for ensuring that all employees had employment agreements. Ms Taylor said that she focussed on getting employment agreements for office/support staff and said that she

overlooked her own agreement at that time. Ms Taylor left her employment before all of the employment agreements had been finalised for staff.

[22] Ms Taylor agreed under questioning at the Authority investigation meeting that she should have drafted her own employment agreement at that time. Although a failure to do so may suggest that Ms Taylor did not regard herself as an employee I have balanced that with the fact that at or about that time Ms Taylor joined KiwiSaver and she received a letter dated 19 August 2010 from IRD that confirmed her employer BJL had asked to make KiwiSaver deductions from her salary or wages. I accept Mr Tay was in all probability unaware of that KiwiSaver deduction. I have also had regard to an email Ms Taylor sent to Brian McCombe, a Chartered Accountant who provides accountancy service to BJL on 13 October 2010. Ms Taylor advised in the email that she wished to sell her shareholding in the company for personal reasons and stated *I intend to stay valuing for Barlow Justice, just need to reduce my stress levels*. Both of these I find support that Ms Taylor viewed herself as an employee and/or the work done in valuing as separate to her shareholder/director duties. I am more inclined when I consider the evidence to the view that Ms Taylor simply did not turn her mind to preparing her own employment agreement rather than that she never regarded herself as an employee.

[23] Ms Taylor continued to undertake residential valuations after she became a director and shareholder as she had when she was employed in 2003. The time, wage and leave records record her occupation as Valuer until 2007, Valuer Extraordinaire for 2007 and Valuer/Director after that time. Ms Taylor said that the valuation work occupied her for about 95% of her time and she spent about 5% undertaking management/ owner type duties. Mr Tay considered the 5% somewhat on the light side but did accept that the greatest proportion of the day would have been taken up with valuations.

[24] Ms Taylor's hours of work when she commenced as an employee in 2003 were usually between 9am and 3pm Monday to Friday to enable her to be home for her family outside of those hours. These working hours continued until mid 2010 when Ms Taylor advised Mr Tay that for health and other reasons that she wanted to reduce her hours of work to four days per week and would not therefore be working Fridays. Mr Tay suggested Wednesday may be preferable as a day off but Friday was the day that Ms Taylor did not work. If an employee's hours reduce then it is usual

that would attract a corresponding reduction in remuneration. I accept Mr van Harselaar's submission that a pattern of reducing a working week by one day with no immediate reduction in payment is inconsistent with what employees would normally expect. The evidence however supports that some steps were taken from the time the hours worked by Ms Taylor were reduced by Mr Tay.

[25] Mr Tay instructed the office administrator Sandra Christie to reduce Ms Taylor's leave by one day 0.75 per week from the time that the hours reduced – see leave records and the evidence of Ms Christie. Ms Taylor was in all likihood unaware of this at the time. Ms Taylor's leave was rapidly becoming exhausted in or about August 2010. Mr Tay says that when he spoke to her at or about this time and asked that she reduce her salary it was because the overdraft was increasing not because of her reduction in working hours. Ms Taylor says that the discussion at reducing her salary was linked to her reduced working week. I find that more probable. Ms Taylor said that she noticed her salary then reduced by over $10,000 per annum for her final four fortnightly salary payments but she had not agreed to this. I also accept that as more likely. Finally, when the relationship between Ms Taylor and BJL came to an end on 4 November 2010 Mr Tay instructed Ms Christie not to pay Ms Taylor's holiday pay to her.

[26] Ms Taylor's leave including sick and bereavement leave continued to be recorded as it had been when she was an employee. Mr Tay did not agree with Ms Taylor that she had to request leave or fit leave in around him. Ms Taylor on the other hand said that Mr Tay would come to a meeting with a wall planner and they would fit leave in around each other. Mr Tay provided email's dated 6 April and 23 June 2009 from Ms Taylor announcing leave being taken instead of requesting leave. I accept that in all likelihood there were occasions when Ms Taylor simply announced she was taking a period of leave although I find more usually it was the subject of discussion and agreement between Ms Taylor and Mr Tay.

[27] I turn now to payments made to Ms Taylor by BJL. The bank records show that early references to deposits from BJL in 2003 were inconsistent because they referred to vehicle reimbursement or salary and bonus rather than wages and/or salary. Initially when Ms Taylor commenced her employment in 2003 she was paid for hours worked on a fortnightly basis and received a vehicle allowance. This method of payment changed to that of a salary in 2004. From July 2004 the references to

deposits made into Ms Taylor's bank accounts were consistently *Barlow Justice salary and vehicle allowance*. The Authority was assisted by the provision of a largely complete set of bank records of the account into which Ms Taylor's salary and other payments were deposited by BJL between 2003 and 2010. I was also provided with Ms Taylor's time, wage and leave records between 2003 and 2010. Ms Taylor continued to receive salary throughout the duration of her time with BJL together with a vehicle allowance. PAYE continued to be deducted from the salary payments for that entire period between 2003 until 4 November 2010.

[28] Mr Tay said that the overall sum received by Ms Taylor by way of salary reflected the risk and reward of the business with salary increases when things were going well or decreases when they were not. He said that it was agreed that salaries would fluctuate depending on how BJL was performing. Ms Taylor did not accept that. Ms Taylor said that when she purchased the shares it was never agreed that her salary would fluctuate depending on company performance. She said that Mr Tay did approach her when the budget results were not good after she became a director and shareholder and would ask her to drop her salary. Mr Tay agreed when he was questioned that Ms Taylor was reluctant to agree to a reduction in her salary. Ms Taylor did not accept Mr Tay's evidence that she received her *base salary as drawings.*

[29] I am not satisfied from the evidence that at the time Ms Taylor purchased her shares there was discussion and agreement about the salary payments being made on a different basis than it had been paid previously. There was a decrease to Ms Taylor's salary in December 2008 from $1933.53 net per fortnight to $1570.24 net per fortnight at which level it remained until April 2009 when it increased to $1601.04 net. It then increased again in April 2010 to $1892.32 net where it remained until Mr Tay instructed Ms Christie to reduce Ms Taylor salary to $1574.73 net per fortnight from 23 September 2010 – the background to this I have already covered in para. 25. The fortnightly vehicle allowance remained at $500 from April 2008.

[30] Mr McCombe was questioned during the Authority investigation meeting about the method of payment to Ms Taylor. Mr McCombe knew that Ms Taylor was an employee of BJL and assumed that she would continue as an employee after she became a shareholder and director. He did have limited contact with the owners of BJL other than preparing and filing annual returns. He said that as an accountant he

knew of owner/operators being paid a salary as employees. I do not accept Mr van Harselaar's submission as persuasive that the PAYE method of taxation and recording of leave/holidays in this case was simply a function of a small business not attending to details. I accept though that taxation is not determinative of the nature of the relationship but one of the factors to be considered.

[31] In or about late April 2006, Ms Taylor received in addition to her salary and vehicle allowance a management fee and shareholder funds. These were separately recorded from the salary and vehicle allowance. The payment of both these additional amounts predated Ms Taylor becoming a shareholder and director, although at that time she had undertaken more managerial duties, and then continued on until payment of the monthly management fee was cancelled in April 2007. From May 2006 to March 2008 Ms Taylor was paid an additional $1,200 per month recorded as Shareholder Funds. In addition to that she received six further drawings from the shareholder funds between April 2007 and June 2010. Ms Taylor requested a copy of her personal file from BJL. On her file was a note that provided *JH t AL – Full salary – no SH funds or mgt fee.* Ms Taylor said that that note probably referred to a discussion she recalled having with Mr Tay in which they agreed they would no longer receive a management fee to assist the profitability of the business. I accept that that discussion took place. The evidence about the note whilst consistent with respect to the management fee does not fit in with the fact that shareholder funds continued to be paid until March 2008. Given however there is other evidence about the payments I do not need to place reliance on the note.

[32] Mr McCombe provided as part of his evidence copies of Annual General Meeting minutes signed by both Ms Taylor and Mr Tay for 2007, 2008 and 2009. Ms Taylor signed the Annual General Meeting minutes for 2010 solely as a director. The company accounts reflected payments to the owners fluctuated depending on company performance. Director's resolutions were also prepared and signed for 2008, 2009 and 2010 by both directors.

[33] Ms Taylor was allocated a credit card in or about 2007 that she says was for work related expenses only and that she did not recall ever using it for anything other then work related expenses which included food and accommodation for the benefit of all staff during a conference. I accept Ms Taylor's evidence that she used the credit

card for work related purposes. Ms Taylor also had a business card that showed her both as a registered valuer and a director.

[34] BJL had professional indemnity insurance for its staff including for Ms Taylor throughout her time with BJL. She did not have personal insurance cover at any point although accepted that this was not the industry norm.

[35] Ms Taylor did have more control and responsibility in the company after she became a shareholder and director at BJL. Ms Taylor took responsibility for managing the office and staff. She prepared the 2010-2101 annual budgets for the company although I accept her evidence as likely that in doing so she kept Mr Tay appraised for reasons I shall shortly expand on. Ms Taylor and Mr Tay both engaged the Results Group to assist them as business mentors and they both attended monthly meetings to review budgets and discussed other business issues. Ms Taylor prepared draft employment agreements for staff at BJL.

[36] Ms Taylor had the ability to increase her salary. Whether she did that without discussion with Mr Tay is an issue about which there is a dispute. Mr Tay provided an email dated 21 April 2010 from Ms Christie that advised him his salary had increased in accordance with Ms Taylor's instructions. Mr Tay in his written evidence about this amongst other matters said *I can confirm that I did not make the decision to increase the directors' salaries.* Ms Taylor did not accept that she solely made the decision to increase the salaries but rather that that email had to be read in conjunction with others including consultation about the budget. There is for example an email dated 12 April 2010 attached as 4.3 to the statement in reply from Ms Taylor to Mr Tay that has an attachment Barlow Justice Budget 1011. It refers to expenses - *have increased salaries, and Anthony's salary--- as discussed.* I accept Ms Taylor's evidence that is supported by the email that she did not solely make the decision following the 2010/11 budget to increase salaries. From the evidence I heard that would have been quite inconsistent with how such decisions had been made it the past which were always with discussion/agreement of Mr Tay. I accept Ms Taylor's evidence as more likely that she did feel a need to check matters with Mr Tay and did not consider that she could make decisions affecting the company on her own.

[37] There was reference to Ms Taylor agreeing to act as guarantor for the company for an overdraft facility. This was only after the Bank had been approached by Mr Tay who I accept had not consulted her before this. In any event the

documents were never lodged with the bank because Ms Taylor resigned as a director and sold her shares. I do not place much weight therefore on this matter.

[38] There were two other matters that Mr van Harselaar placed emphasis on in this relationship in his final submissions. The first was a discussion that the Authority heard evidence about between Ms Taylor and Mr Schofield in or about September 2010 at a café known as the EAT café. Mr Tay was not present at the meeting. Mr Schofield said that during the discussion he believed he had made the position clear to Ms Taylor that if she resigned as director and shareholder then Mr Tay was not required to give her a position in the company. I accept that Ms Taylor may well have made a comment along the lines set out in Mr Schofield's statement of evidence that *she would like to think she would still be there if Mr Tay would have her*. It was accepted by Mr Schofield and Mr Tay that there had been no discussion prior to this meeting at the EAT café about whether Ms Taylor would continue with her registered valuing with BJL if she resigned as a director and shareholder. There was no discussion about that at the extraordinary meeting to discuss the sale of her shares.

[39] The other matter Mr van Harselaar referred to was the manner in which Ms Taylor described herself in the sale and purchase agreement document. Ms Taylor described herself as the seller, a 30% shareholder and director in BJL and Anthony Taylor described as the buyer an employee in BJL. This is a mater to be taken into account although not a determining factor as the Authority is required to determine the real nature of the relationship.

[40] Having provided an overview of how the relationship worked in practice after Ms Taylor became a shareholder and director and some comparison with how it worked prior to 2007 I now examine the relationship in light of the tests. I shall start with the integration test. After becoming a director and shareholder Ms Taylor continued to spend the majority of her time conducting residential valuations as she had done previously. She continued to receive a salary from which PAYE was deducted by BJL together with a vehicle allowance. Her leave continued to be recorded and she did not hold personal liability insurance rather that was held by BJL. BJL paid for training expenses and provided a credit card for work related expenses. These matters support that Ms Taylor performed work that was integral to the business and that she was integrated into the business. These are factors consistent with the existence of an employment relationship.

[41] From 2006 Ms Taylor received a management fee although it was agreed with Mr Tay that this would stop being paid in early 2007 and shareholder funds were regularly paid until 2008. Ms Taylor had the ability to draw down shareholding funds in consultation with Mr Tay and sign documents in her capacity as a shareholder and/or director. The legal principles are clear from *Lee* that an employee may have these concurrent duties and these matters do not lead to a conclusion that there was not a contract of service and Ms Taylor was not an employee.

[42] I now turn to control. I accept Mr van Harselaar's submission that *Smith* is distinguishable from the facts of this matter in terms of the level of control. Ms Taylor had more control than Mr Smith. Judge Travis in *Smith* stated at pg. 341:

> *The result in any particular case will depend on its facts and there will always be points of agreement and disagreement between the various authorities. The issue is whether, viewed as a totality the evidence establishes 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.*

[43] What was the evidence of control in the relationship? I find that Mr Tay and Ms Taylor generally consulted over major decisions including those of employment of staff, salaries, insurance and the financial situation of BJL. There was no evidence to satisfy me that Ms Taylor employed staff without Mr Tay's knowledge and approval although I heard evidence that she was certainly involved in that process. Mr Tay's actions though in having Ms Taylor's salary and annual leave entitlements reduced when she reduced her working week by one day and, ultimately her holiday pay stopped without discussion with her were matters that I have had regard to. Ms Taylor was a minority shareholder. Mr van Harselaar's submission is that the shareholding is immaterial to the real nature of the relationship because its primary effect was only for allocating profits. I accept that, but the evidence from the way the relationship worked in practice is that Ms Taylor did not make significant decisions without referring them to Mr Tay for his approval. Mr Tay however made some decisions that directly impacted on Ms Taylor without her agreement before doing so. Ms Taylor had some control over the operations of BJL but I do not find that it was unfettered control. BJL was not a family company and the relationship between Ms Taylor and Mr Tay was a business one and at arms length. There are factors in terms of control that favour both a contract for and a contract of service. I do not find Ms Taylor had full and unrestricted control over BJL so as to conclude, as some

judgments have it was such that *Lee* could not be relied in these circumstances where Ms Taylor was working full time as a valuer and receiving a salary.

[44] I now turn to the fundamental or economic reality test and whether Ms Taylor was in business on her own account. Ms Taylor did take risks in her capacity as a shareholder and director. She invested capital into BJL and took a risk in terms of any fluctuations in the share value and there were also risks associated with being a director with respect to duties and obligations. I accept Ms Vincent's submission that this can be seen as different from the certainty and consistency around valuing as an employee and receiving a salary. Ms Taylor received a salary whether or not the business did well. It was only reduced with her agreement save as to her final payments when it was reduced in the absence of agreement and was not per se dependent on profitability. Any income generated by Ms Taylor's valuation work went to BJL in the first instance. BJL indemnified her by insuring her against any professional negligence or loss and paid her a vehicle allowance. BJL deducted PAYE on her behalf. Ms Taylor worked regular and set hours in the business. She did not work elsewhere. Mr van Harselaar submitted that goodwill was an element in the share transfer and subsequent funds that Ms Taylor derived and that this is not consistent with an employment relationship. I accept Ms Vincent's submission that Ms Taylor's situation is different from that of an employee who buys into a business including the goodwill of that business to work in it with all the risks that that carries with it. Ms Taylor continued to carry out valuations as she had done before becoming a shareholding and director. When I weigh these particular elements under the fundamental test I find that they favour a contract of service.

[45] Mr Tay relied heavily on valuation industry practice and said that in his discussions with others in the industry they do not have employment agreements for shareholder directors. He said that he had checked with a large firm in Auckland and throughout New Zealand. Industry practice is a factor to considered but has to be assessed with the other factors in the relationship. Mr Tay only gave general evidence of industry practice. The Authority did not have the benefit of being able to ascertain from other companies in the valuation industry whether in similar circumstances to Ms Taylor's the employment issue was dealt with by discussion, in the shareholders agreement or company constitution. I do not place a great deal of weight on industry practice in the circumstances.

[46] I find that the totality of evidence as set out above, when considered as a whole, supports that Ms Taylor was employed under a contract of service notwithstanding that she was also a director and shareholder. I find that Ms Taylor was an employee of BJL.

Is there money owing because of the reduction of the holiday leave entitlement or unpaid wages?

[47] When Ms Taylor reduced her working week by one day a week Mr Tay reduced her holiday leave entitlement by one day a week. He should have talked to her about this but I am not minded to order reimbursement of the holiday pay in circumstances where Ms Taylor varied her employment agreement with BJL to work five days a week to four days a week. It then appears that when leave was exhausted Ms Taylor's pay was reduced for her last four pay periods at a rate slightly under 20%. Ms Taylor normally received $2500 gross per fortnight and this was reduced to $2042.30 per fortnight. An exact 20% reduction would have reduced the payments to $2000 per fortnight. I do not find it would be fair to reimburse Ms Taylor for any reduction of salary except tot the extent that there is an overlap between the deduction of leave and reduction of salary. I was not able to ascertain whether there was such an overlap. It did not appear to me that there was any further holiday pay owing either. I suggest Ms Vincent consider both these matters and talk to Mr van Harselaar about this. If there is no agreement then leave is reserved for either party to return to the Authority.

Was Ms Taylor dismissed?

[48] I find that Ms Taylor was dismissed when she was handed the letter dated 4 November 2010 advising her that Mr Tay was not able to offer her a position as an employee.

Was the dismissal unjustified?

[49] BJL did not seek to justify the dismissal as it was always the position of BJL that Ms Taylor was not an employee and therefore it was not obliged to keep a position open for her. There was no fair process preceding the dismissal and the statutory obligations of good faith were not complied with. It was not enough for Mr Tay to speak to Mr Schofield about there being no position for Ms Taylor in the company. I have considered Mr Tay's evidence that Ms Taylor already had been

alerted to this risk. I accept that is to some extent correct. I do not find though that Ms Taylor had any expectation that she would be dismissed by letter on 4 November 2010 after signing the shareholding agreement with Anthony Taylor without any further communication. I do note that she had continued to work after resigning as a director on 1 November 2010.

[50] I find that Ms Taylor was unjustifiably dismissed from her employment. She has a personal grievance and is entitled to remedies.

Remedies

Lost Wages

[51] Ms Taylor explained that she had taken prompt steps to find other employment and was successful in obtaining some casual work and more valuations. She supplied payslips that she had received during this period. For a three month period from 5 November 2010 until 6 February 2011 she received $5,422.81 gross. My calculation for what Ms Taylor would have received at BJL will differ from Ms Taylor's calculation because I have calculated lost wages on the basis of a fortnightly pay of $2042.30 gross. That is what she was receiving at the time of her dismissal, no issue was raised about that until a much later stage and there was justification for the reduction. The amount I arrive at is $13274.95 gross. $13274.95 less $5,422.81 = $7852.14 gross. Ms Taylor mitigated her loss of her salary from BJL and subject to any findings as to contribution she is entitled to be reimbursed for lost wages in the sum of $7852.14 gross. Any notice period is absorbed within that amount.

Compensation

[52] I accept that Ms Taylor was hurt and humiliated by her dismissal. The evidence supports she was quite shocked to receive the letter from Mr Tay and described in her evidence having to then walk past staff and advise them she no longer had a role. There was no notice period or discussion and the dismissal was summary in nature. Ms Taylor voiced her concern about the lack of notice at the time of her dismissal. She said that she had regarded herself as having given seven years of loyal hardworking service including in the days leading up to her dismissal to BJL. I also heard from Ms Taylor's husband Lyndon Taylor who described her as stressed and angry about the situation and that she was affected badly.

Subject to any findings I may make about contribution a fair award to reflect the hurt suffered is $8000.

Contribution

[53] The Authority is required in deciding the nature and extent of remedies to be provided to consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance – s. 124 of the Act.

[54] Mr van Harselaar submits that Ms Taylor contributed to her dismissal because Ms Taylor never addressed the issue of her own employment agreement prior to her dismissal, did not raise or clarify the issue about a continued position after Mr Schofield talked to her and advised that she may not have a position within BJL after the sale of her shares and in the agreement with Mr Taylor to sell her shares did not describe herself as an employee. There has to be a causative link between the situation giving rise to the personal grievance and Ms Taylor's actions or inaction. The situation giving rise to the personal grievance was that Mr Tay without discussion in a letter advised Ms Taylor that there was no position for her in the company as a employee. I do not find a causative link between that and Ms Taylor's failure to prepare am employment agreement, failure to talk to Mr Tay about her discussion with Mr Schofied or the way she signed the agreement with Mr Taylor. I do not find that Ms Taylor contributed to her dismissal and there is to be no reduction to the remedies awarded.

[55] I make the following orders with respect to lost wages and compensation:

- I order Barlow Justice Limited pay to Janice Taylor the sum of $7852.14 gross being lost wages.

- I order Barlow Justice Limited to pay to Janice Taylor the sum of $8000 without deduction being compensation.

Holiday pay and interest on lost wages

[56] Ms Taylor has lost money or the benefit of her entitlement under the Holidays Act 2003 that she could reasonably have expected to have obtained if her personal grievance had not arisen. That can be quantified by multiplying the three months gross lost wages of $7852.14 by 8% to arrive at a sum of $628.17 gross.

- I order Barlow Justice to pay to Janice Taylor the sum of $628.17 gross being a lost benefit under the Holidays Act 2003.

[57] There is a claim for interest on the lost wages. The Authority has power to award interest on any monetary sum awarded by way of remedy under clause 11 of the Second Schedule of the Act. In the circumstances of this case where there was an issue as to whether Ms Taylor was an employee or not that neither Ms Taylor or Mr Tay had actively turned their minds to I am not minded to make an award of interest.

Costs

[58] I reserve the issue of costs. I encourage the parties to attempt to reach agreement failing which Ms Vincent has until 15 August 2012 to lodge and serve submission as to costs and Mr van Harselaar has until 5 September 2012 to lodge and serve submission in reply.

Summary of findings and orders made

- I have found that Ms Taylor was an employee of Barlow Justice Limited as at 4 November 2010 notwithstanding that she was also a shareholder and director.
- I have found that Ms Taylor was unjustifiably dismissed form her employment on 4 November 2010.
- I did not find that Ms Taylor contributed to her dismissal.
- I ordered Barlow Justice Limited pay Ms Taylor the sum of $7852.14 gross being lost wages.
- I ordered Barlow Justice Limited to pay Ms Taylor the sum of $8000 without deduction being compensation.

- I ordered Barlow Justice Limited to pay Ms Taylor the sum of $628.17 gross being lost benefits under the Holiday Act 2003.
- In the circumstances of this case I made no order for interest on the lost wages.
- I reserved the issue of costs and have timetabled for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority