

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 69/07
5048663**

BETWEEN ALAN RICHARD
 MARSHALL
 Applicant

AND CORSTORPHINE HOUSE
 SERVICES LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Lesley Brook Counsel for Applicant
 Nico Francken, Advocate for Respondent

Investigation Meeting: 14 February 2007, Dunedin

Determination: 25 June 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alan Marshall was engaged by Corstorphine House Services Limited (Corstorphine House) from August 1999 until 31 March 2006. Corstorphine House operates a boutique luxury hotel in Dunedin. The hotel is set in extensive grounds and Mr Marshall was engaged as the gardener.

[2] Mr Marshall says that he was engaged as an employee, that the termination of his employment was unjustified and that he therefore has a personal grievance against his former employer. Nico Francken and Irina Francken are the principals of Corstorphine House. They say that Mr Marshall was engaged as an independent contractor and resisted subsequent attempts to employ him as an employee. They acknowledged terminating Mr Marshall's services, but say that he cannot have a personal grievance because he was never an employee.

[3] The issue to be determined is whether Mr Marshall was engaged on a contract for services or whether he was employed under a contract of service. That involves looking at the arrangements originally entered into then assessing whether there was any change during the course of the

relationship. If it is established that Mr Marshall was an employee, arrangements will need to be made to investigate further whether there is a personal grievance.

The original arrangement

[4] Corstorphine House originally intended to employ a gardener. Mr Marshall had been overseas for a short while and saw the position advertised when he returned. Before then he and his wife jointly owned a garden centre business which he says was closed down before they went overseas. The operation of that business resulted in losses. Mr Marshall's evidence is that a salary paid monthly was offered by Mr Francken. The frequency of payment made him think of it like invoicing so he asked if it could be a contract payment put against "*Dean's Garden Centre*". He says he thought he could offset the business losses against earnings as an employee of Corstorphine House just as he had done in previous employment for losses on rental properties owned by him through a loss-attributing qualifying company.

[5] In short, Mr Marshall's evidence is that he thought he was entering an employment relationship despite his request for a *contract payment*. I do not accept that evidence. I find that Mr Marshall knew well enough that the tax losses from his previous business activities were only available to be offset against further income if he was operating a business on his own account. That is why he sought payment on an invoice or contract basis.

[6] The discussion between Mr Marshall and Mr Francken was recorded in writing in a letter from the latter to the former. It reads:

Dear Alan,

Re: Appointment as Gardener

By means of this letter I would like to confirm our pleasant discussion about your appointment as a Gardener at Corstorphine House.

The role of the Gardener at Corstorphine House is a varied one in that you will not only be responsible for the beautification of the grounds around the House, but also to convert the grounds into an economic and profitable unit. Ultimately we envisage that the grounds will supply the House all its needs (or at least a major part) in terms of vegetables, herbs, eggs, flowers, etc. Furthermore we should achieve a profitable business selling produce to the outside world. As discussed, we are very flexible in the way and means of achieving these objectives, however it should be clear that the gardens should cover their own expenditure as soon as possible.

Subject to our respective accountants' approval, we have agreed on the following terms and conditions:

Monthly fee: You will invoice us a monthly fee of \$2,500 plus GST.

Bonus: You will be paid a bonus of 10% of the garden turnover in excess of \$1,500 per month (turnover excluding GST).

Expenses: We will pay you all expenses as agreed by us in advance, subject to proper documentation.

Budget: You will submit regular budgets for the garden operation, including both income and expenditure.

Hours: In principle, you will work at Corstorphine House for 40 hours per week, or so much longer or shorter as it takes to carry out the job.

Holidays: You are entitled to 15 days holiday, plus statutory days, to be taken by mutual agreement as the job allows.

Taxes and

Insurance: All taxes and insurance in respect of your activities are for your account except GST on costs charged directly to us.

Termination: The arrangements as contained in this letter can be terminated by either party giving the other party one month's prior notice in writing.

The commencement date is 01 August 1999. (We expect to see you on 02 August.)

We trust the above is as discussed between us. We are looking forward to a mutually profitable working relationship.

Assuming that the above is correct, kindly sign the enclosed copy of this letter and return to me to signify your acceptance of its terms and conditions.

With kind regards.

Yours faithfully,

Corstorphine House Services Limited

(signed) Nico J C Francken

[7] As requested, Mr Marshall signed and returned a copy of the letter. In evidence he disputes also writing the word "Accepted" just above his signature. While I am not convinced by his evidence on that point, it is not important given his acceptance that he signed and returned a copy of the letter. The letter therefore establishes the terms of the relationship at its commencement.

[8] Considering the terms of the contract, it more closely resembles an employment contract for a salaried position rather than a contract for services. Only the terms about the monthly payment and the references to taxes and insurance point to a contract for services. The terms about expenses, budget and hours all indicate a senior employee subject to standard management oversight. The "holidays" provision also points to employment. The description of the gardener's role demonstrates that the position was intended to be integrated into the business of Corstorphine House.

The relationship in practice

[9] In practice, the relationship operated as employment from the outset with the exception of payment of the "monthly fee". The equipment used by Mr Marshall was mostly owned or provided

by Corstorphine House. Mr Marshall initially used his own credit card for necessary purchases and was reimbursed by Corstorphine House. Later, he was supplied with a credit card. He was expected to and did perform the work personally. He had no right to provide substitute labour. Mr Marshall was reimbursed for using his own vehicle and later was able to use a vehicle owned by Corstorphine House. When other ground staff were engaged, Mr Marshall was given responsibility for supervising them. From time to time, Corstorphine House engaged contractors for development or other work in the grounds and Mr Marshall supervised those contractors on behalf of Corstorphine House. Mr Marshall took paid annual and public holidays as well as some paid sick leave.

[10] Corstorphine House sought to keep track of when Mr Marshall was at work or on holiday and Mr Marshall was expected to comply with Corstorphine House's policies and procedures in this respect. Indeed, it was a point of some friction between the parties about whether he did properly comply with these requirements. For example, there is an email dated 15 September 2003 from Mr Francken to Mr Marshall asking him to discuss holiday plans in advance and to use the standard holiday application form.

[11] While the terms of appointment required Mr Marshall to invoice Corstorphine House monthly, it was Corstorphine House's administrative staff who created nearly all the invoices. The invoices available to the Authority have been created by a computer word processor. Some are headed up "*Dean's Garden Centre*" and others are in the name of "*Dean's Garden Centre Limited*". They do not include a GST number or any GST content in the amount of payment. Some are for a single month while others are described as a "*continuous invoice*" for a specified period, for example, 1 April 2002 to 31 March 2003. Dean's Garden Centre was set up as a creditor in Corstorphine House's accounting system and the creditor report provided shows monthly payments having been made without any GST content. The "*monthly fee*" was actually paid by direct credit into the bank account given by Mr Marshall. That was initially a joint account between Mr Marshall and his wife, but the payments were later directed to another account in Mr Marshall's name alone following his separation.

[12] A transactions summary shows payments for most of 2000 at \$2,812.50 per month (i.e. \$2,500 plus 12.5%, presumably GST). By November 2000, the sum paid was increased to \$3,000 per month. Later that increased again to \$3,150.

[13] Invoices were raised for payments other than the "*monthly fee*". First, there are a number of invoices relating to payment of car expenses calculated on a per kilometre basis. One invoice includes a claim for "*mobile phone expenses*" while several refer to "*contract charges*". These

invoices all appear to be of a reimbursing nature. While I accept that the invoices were created by or with the assistance of Corstorphine House's administrative staff, they must have been created at Mr Marshall's request they include details that would only be known to him and requests for payment by specific dates. The last of these invoices is dated November 2004.

[14] For at least six months in 2000, Mr Marshall's wife also did some work for Corstorphine House delivering produce. An additional payment was made for this work. Mr Marshall's evidence, which I accept, is that the relevant invoice was prepared by his wife. However, I do not accept his attempt to distance himself from its significance as a piece of evidence indicating a contract for services between himself and Corstorphine House. The invoice includes a claim for reimbursement of expenses incurred by Mr Marshall on behalf of Corstorphine House. Mr Marshall must have been aware of the invoice as he must have been the source of that information. It is also improbable that Mr Marshall's wife would have prepared and delivered an invoice including a claim for the *monthly fee* due to *Dean's Garden Centre* without Mr Marshall being aware of that.

[15] There is some evidence that Mr Marshall operated a business on his own account personally or through a company, at least during the first two years of his relationship with Corstorphine House. I note that the company that previously traded as *Dean's Garden Centre* (Marshall's Garden Centre Limited) was struck off on 14 August 2002. As requested, Mr Marshall provided company and personal tax returns prepared by his accountant. I have returns for *Marshall's Garden Centre* for the years ending 31 March 2000 and 31 March 2001. His personal tax returns for those years and 31 March 2002 were also provided. Apparently no other returns were prepared. The *Marshall's Garden Centre* returns show professional fees having been derived and business expenses having been incurred in both 2000 and 2001. They also show the payment of GST in both years. The payments received from Corstorphine House are not recorded as income from salaries or wages in Mr Marshall's three tax returns.

Other proposed contracts

[16] In November 2003, Mr Marshall requested an increase in the monthly payment. There is a memo dated 12 November 2003 from Mr Francken to Mr Marshall confirming that "*The salary will remain at \$3,000 per month ... for the time being we will keep paying you on the basis of the invoice as rendered*". There is also a file note dated 29 November 2003. Mrs Francken's evidence, which I accept, is that their accountant raised with them the proper tax treatment of the payments being made to Mr Marshall. That caused Mrs Francken to speak to Mr Marshall about an employment agreement. Mrs Francken's file note and her evidence has Mr Marshall expressing a

preference for receiving \$3,000 in accordance with the arrangement with "*Dean's Garden Centre*". Accordingly, Corstorphine House continued to pay Mr Marshall in that manner.

[17] The issue arose again in 2005. Jill Hyslop had been Corstorphine House's accounts officer since June 2004. Her evidence is that, being aware of an IRD requirement for withholding tax to be retained from non-exempt labour-only contractors not trading through a company structure, she asked Mr Marshall whether he had an exemption certificate. Mrs Hyslop knew that there was no registered company aligned with *Dean's Garden Centre*. I accept Mrs Hyslop's evidence that Mr Marshall told her that *Dean's Garden Centre* was actually a company called *Marshall's Garden Centre Limited*. I also accept her evidence that Mr Marshall would not allow her to make any deduction from the monthly fee payable to *Dean's Garden Centre*.

[18] Mrs Hyslop gave Mr Marshall a copy of an IRD newsletter explaining the withholding tax requirement. This newsletter had prompted Mrs Hyslop to initiate the discussion with Mr Marshall. This conversation was some time in 2005 after receipt of the newsletter which is dated September 2005.

[19] In late December 2005, Mr and Mrs Francken spoke with Mr Marshall about the status of the relationship. They told Mr Marshall that they wanted to change the relationship to one of employment as of 1 January 2006. Several days later, Mr Marshall was given a written individual employment agreement which he was asked to sign. Mr Marshall's evidence about these exchanges is that he was told that they wanted him to sign an up-to-date employment agreement as they could not find his old agreement. It is correct that Mr and Mrs Francken said they were unable to find the original agreement (since found), but I do not accept the implication that the proposed new agreement was not presented to Mr Marshall as effecting a change from a contractor relationship to an employment relationship. In any event, there was discussion over the amount of annual leave provided in the employment agreement; Mr Marshall wanting an increase to four weeks rather than the original three weeks. There was no agreement on this point.

[20] There is disagreement about whether there was any further discussion about the proposed employment agreement but it is not necessary to resolve the point. Mr Marshall received a letter dated 10 January 2006 from Mr Francken. The letter refers to the late December 2005 conversation mentioned above, and the lack of agreement, saying: "*As you have not accepted our employment offer, it has now been withdrawn*". The letter also gives notice that the existing contracting relationship will end on 31 March 2006. In a subsequent letter dated 16 February 2006, Mr Francken advises of a decision to reorganise the management of the grounds by supervising

work directly himself. Mr Marshall is invited to tender for the work of maintaining lawns and hedges.

[21] The relationship deteriorated to the point where on 8 March 2006 Mr Marshall was requested to leave the property that day and not return. That is what happened.

Conclusions about status

[22] The Employment Relations Act 2000 requires the Authority to determine the real nature of the relationship between Mr Marshall and Corstorphine House, having considered all relevant matters including any matters indicating their intention but not to treat as determining the matter any statement by them as to its status.

[23] Mr Marshall intended self employment for the reasons expressed above. Corstorphine House originally intended employment but was willing to accommodate Mr Marshall's intentions. The written agreement and particularly the relationship in practice more closely resembled employment. However, Mr Marshall rebuffed several attempts by Corstorphine House during the relationship to treat him as an employee.

[24] Counsel referred me to *Telecom South v Post Office Union* [1992] 1 ERNZ 711. In that case, the Court of Appeal was faced with a written agreement that required payment to be made to a senior manager of a monthly fee plus GST on production of an invoice with the manager to be responsible for all taxes as if self employed. The particular clause in the contract was described as *transparently a tax device* and the Court of Appeal barely paused to reject an argument that the manager was not an employee. However, Sir Gordon Bisson thought it necessary to sound a word of caution that those who seek to introduce taxation advantages into terms of employment might have to abide by the consequence that they are classified as self employed for personal grievance purposes in line with *Massey v Crown Life Insurance Co* [1978] 2 All ER 576.

[25] In the present case, I do not accept that the term in the written agreement in respect of payment can be dismissed as just a tax device. I have found that Mr Marshall intended self employment, the agreement was drafted to meet this and he then accepted the arrangement. Significantly, he refused Corstorphine House's attempts to treat him as an employee. Only then did Corstorphine House terminate the arrangement relying on Mr Marshall's continued assertion of self employment. The substantial merits of this matter are that Mr Marshall is caught by the note of caution sounded by Sir Gordon Bisson in *Telecom South* and the point about justice made in *Massey v Crown Life Insurance Co*. He was self employed and cannot pursue a personal grievance.

Summary

[26] Mr Marshall was not an employee of Corstorphine House.

[27] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority