

completed and signed off the appropriate documentation for the incorporation and registration of the company, including their roles as directors and shareholders.

[3] On 18 May 2007 Mr Greenwood produced an offer of employment and an employment agreement. They are now in dispute over what those documents were produced for, when difficulties arose over the financing of the Seddon Street property. During the time they were arranging finance for the business and property Ms Philpott resigned as a director, but remained a shareholder in the business.

[4] Ms Philpott attended to the shop so Mr Greenwood could spend more of his time in his other business activities. However, after establishing the shop, their personal relationship deteriorated. This had an impact on the running of the business, resulting in Mr Greenwood having to spend more time there.

[5] Mr Greenwood says that he found out that Ms Philpott, behind his back, had made arrangements to purchase another residential property in Lucknow Street and finance it. He accepted that their relationship deteriorated and came to an end. He says that the business was not making money and could not support the two of them. He says that once Ms Philpott decided to leave the relationship she started to close the shop early when she was working. He had to put a notice of claim on the property titles to protect his financial interest. He made a claim on the proceeds of one of the properties upon it selling; and, upon her changing her mind over leaving the relationship and giving him an ultimatum to leave the business, he took the drastic step of changing the locks on the shop door.

[6] Ms Philpott says she discovered that the lock on the premises had been changed and she had been locked out of her employment. She received a letter dated 1 June 2008 in which Mr Greenwood asked her to cease working that she interpreted as a dismissal. On 5 June there was an altercation between them at the shop and the Police were called. They both have completely different versions of what happened.

[7] Ms Philpott is claiming unpaid wages and holiday pay and seeking remedies for a personal grievance. She abandoned claims for breaches against London Limited for failing to provide wages and time records and pay holiday pay and Mr Greenwood personally for aiding and abetting in the alleged breaches.

[8] Mr Greenwood says that Ms Philpott was never an employee in the business, but that arrangements were made for work in the business as an owner and to be paid shareholder's drawings. He denied all Ms Philpott's claims including that the business owed her any wages and holiday pay.

The issues

[9] What is the law that applies to determine this question?

[10] The parties are in dispute over the meaning and interpretation of the document that purported to be an offer of employment dated 4 May 2007 that Ms Philpott says was her employment agreement. They disagree on the integrity of Ms Philpott's written acceptance of that offer.

[11] What was the document dated 18 May 2007 that purported to state that Ms Philpott was an employee in another one of Mr Greenwood's business activities? Was it originally produced only for the purposes of obtaining funds from a broker for the Seddon Street property?

[12] Was the letter dated 1 June 2008 a letter of dismissal?

The law

[13] The determination of the role of the relationship between Ms Philpott and Mr Greenwood and London Limited is based on the real nature of the relationship and the meaning of employee under section 6 of the Employment Relations Act.

[14] S 6 of the Act provides that where the real nature of the relationship is the test for the purpose of determining whether someone is an employee, unless the context otherwise requires.

[15] S 6 of the Act lays out the meaning of *employee*. It states that unless the context otherwise requires, employee means a person of any age employed by an employer to do any work for hire and reward under a contract of service. It also

provides that in deciding whether a person is employed by another person under a contract of service, the Authority must determine the real nature of the relationship. In doing so the Authority must consider all relevant matters, including any matters that indicate the intention of the persons. In determining the matter any statement by the persons about their intentions will not be decisive.

[16] The Supreme Court, and the Employment Court have set out the following principles when determining whether a worker is an employee or an independent contractor:

- The Authority/Court must determine the real nature of the relationship.
- The starting point is an analysis of the terms and conditions which the parties agreed to.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the fundamental test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[17] This is not a case about employment verses independent contracting but instead is about whether or not Ms Philpott was running the business (as opposed to being an employee) with Mr Greenwood

[18] There are principles that apply between directors and owners of a business and that they can enter into employment agreements, but that does not mean there will always be a contract of service. The United Kingdom Court of Appeal provided guidance in *Secretary of State for Trade and Industry v Bottrill* EATRF 98/013203 where it held:

“...whether or not an employer/employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has the controlling shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which is relevant and certainly is not to be taken as determinative without considering all the relevant circumstances.”

[19] The Court also held:

“The first question which the Tribunal is likely to wish to consider is whether there is or has been a genuine contract between the company and the shareholder. In this context, how and for what reason the contract came into existence (for example, whether the contract was made at a time when insolvency loomed) and what each party actually did pursuant to the contract are likely to be relevant considerations.

If the Tribunal concludes that the contract is not a sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, actually gave rise to an employer/employee relationship. In this context, of the various factors usually regarded as relevant (see for example, Chitty on Contracts 27th ed. (1994) para.37-008), the degree of control exercised by the company over the shareholder employee is always important. That is not the same question as that relating to whether there is a controlling shareholding. The Tribunal may think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the Articles of Association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant. It is for the tribunal as an industrial jury to take all relevant factors into account in reaching its conclusion, giving such weight to them as it considers appropriate.”

[20] The Employment Court in New Zealand held in *Smith v Practical Plastics Ltd* [1998] 1ERNZ at 341 that:

“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.”

What was Ms Philpott's role?

[21] The first issue to determine is whether Ms Philpott was an employee having regard to what the parties' intentions were at the time. The parties' intentions at the time have come into stark contrast and are unclear.

[22] Some documents support Ms Philpott in her claim of being an employee. However, I must consider whether or not these are reliable. The evidence available to support Ms Philpott being a co-owner (and not an employee) is as follows:

- The sale and purchase agreement signed by Ms Philpott and Mr Greenwood as joint purchasers of the business.
- Personal guarantees on the lease from Ms Philpott and Mr Greenwood: sale and purchase agreement dated 9 May 2007 and a covering letter dated 9 May 2007 produced by Michael van Deldon, lawyer and Paul McCarthy, financial advisor.
- Mr van Deldon's letter confirmed in writing that Ms Philpott and Mr Greenwood purchased the business, personally guaranteed the lease and that they had the intention to operate the business together.
- Mr Greenwood and Ms Philpott each had a 50% holding in the company, and she was a director for a time when the business was set up. Her removal as a director coincided with the financing arrangements.
- A chartered accountant's evidence that the accounting and documents prepared for the business were completed on the basis that Ms Philpott was working as a co-owner and payments to her were made as shareholder's drawings from the business. Mr Barlow, the accountant was not available for the Authority's investigation meeting, but a colleague, Joan Worthington appeared. Ms Philpott could not contradict Ms Worthington's evidence.
- When a difficulty arose due to a misunderstanding by Mr Greenwood and his broker over financing the purchase arrangement on the Seddon Street residential property, Ms Philpott approached her own broker to assist getting finance. Mr Greenwood says he had no contact with her broker, but understood from Ms Philpott that she had to present

evidence of an income as an employee in the business to get finance and help out because she had no equity. He says on this basis she resigned as a director of the company and he prepared a form of employment agreement for her to provide to the broker, but there was never any intention that she would be an employee. He relied upon her remaining as a shareholder, and the accounting arrangements.

- Mr Greenwood says he prepared the covering letter: “*offer of employment*” on 18 May 2007 on his computer and used the Department of Labour agreement builder, and the letter was dated after he had done this; but dated retrospectively “4 May 2007”. Ms Philpott needed to reply as to whether she accepted the position by 11 May 2008, and she did not reply.
- Mr Greenwood says he never saw the signed acceptance of the employment agreement until after Ms Philpott commenced a personal grievance. Ms Philpott did not challenge this or request the computer details. I have accepted Mr Greenwood’s evidence of these details.
- Arrangements were made for Ms Philpott to demonstrate that she had further income to cover the loan and Mr Greenwood says this explains why he provided Ms Philpott with a letter to say he would pay her to type up building inspection reports for another business he was involved in at the time. He says she could not meet his expectations in carrying out the work and was never paid. He says there was never any intention to employ her in that role because he relied upon his own work and typing his own reports from his illegible handwriting
- Ms Philpott had drawings from the business to cover her personal expenses and that was met by automatic payments to be paid into her account with Westpac. The payment was subsequently increased to cover the mortgage. The reference to “drawings” is supported by bank transaction documents and the work completed by Ms Worthington.
- Ms Philpott “*dropped a bombshell*” on Mr Greenwood that she had bought another property in her own name. She made other arrangements to obtain a loan using one of their properties to cover it, without Mr Greenwood’s knowledge, and she changed banks. He says she reneged on using extra funds that she had obtained to reduce debt on the business. The arrangements with the banks, the payments from

the business account and a reduction was made in personal borrowings to cover the Lucknow Street property.

- Ms Philpott decided her own work arrangements when running the business such as taking some time off and closing early (not challenged).
- Ms Philpott used the business account.
- Accounting records do not refer to wages and holiday pay being part of the relationship.
- Bank records refer to “drawings”.
- Ms Philpott used stock from the shop for personal purposes without needing permission.
- A letter dated 1 June 2008 terminating their business arrangement.

[23] Ms Philpott says she was an employee and this is supported by:

- Mr Greenwood’s control of the business.
- Mr Greenwood put the money in.
- Mr Greenwood prepared the employment agreement and a letter agreeing to pay her for certain work.
- Mr Greenwood prepared the “*dismissal letter*” dated 1 June 2008.
- Mr Greenwood took over the running of the shop and made the decisions relating to the business.
- Mr Greenwood decided to change the locks to keep her out of the premises.
- The personal relationship breakdown and attempts made by Ms Philpott to protect her interests by taking property that was part of the relationship and business.
- That she had no involvement and had no expertise in the accounting and business arrangements.
- The employment agreement and Mr Greenwood’s letters.
- The accounts that refer to salaries.

[24] Because the intention of the parties at the time they entered into their arrangement is unclear and is not decisive of the relationship I have to determine the real nature of the position. Putting the information together there is a consistency

between Ms Philpott and Mr Greenwood that the two of them were in ownership of the business and running it. There was a degree of control by Mr Greenwood in the business that was disproportionately greater than what Ms Philpott had. However, she could choose her hours of work, she had joint access to the business account for drawings, she cashed up and she used stock for her personal purposes.

[25] Ms Philpott was also integrated in the business and had an interest as a 50% shareholder. Other considerations include:

- Ms Worthington presented her evidence reliably and honestly. She is an independent professional carrying out her work on the information that she had been provided with. Ms Philpott did not produce any evidence to support her suggestion that Mr Greenwood's accountants were saying what Mr Greenwood wanted. Her evidence was thus not contradicted or challenged and was consistent.
- Ms Philpott was deceptive in her relationship with Mr Greenwood by buying another house behind his back, financing it without being open in her relationship with him, and she was deceptive about her arrangements to get finance.
- Mr McCarthy raised his doubts about the situation that Ms Philpott presented to him for finance and he could not understand why she had no control in the business given her shareholding and her role in it.
- The letter dated 1 June 2008 is ambiguous about the relationship and although it stated that Ms Philpott was not obligated to continue working there were not enough funds available to pay weekly drawings, which is a reference to running the business as a shareholder.

[26] The credibility of Ms Philpott and Mr Greenwood has become a central issue. There was little dispute between them about how the business was run. There was a shared responsibility, which included the signing of the lease, an agreement to put the business on the market, and the signing of the real estate agency form. There is a linkage between the letter purporting to offer Ms Philpott employment and the purported employment agreement with financing arrangements. This is supported by the business arrangements and documents where during what Ms Philpott called her employment there was an absence of any wages and time records. The employment agreement was also left in the bank, and not with the accountants. The accountants

were not given any instructions on any employment arrangements. The evidence and information from the mortgage broker and the accountants did not support Ms Philpott.

[27] Mr Greenwood's decision to act in excising his rights to run the business and terminate Ms Philpott's role in the business relationship related to him being a director, he also had a 50% holding and he had the primary financial interest having put the money in. The business was also losing money. For these reasons I do not accept that his actions made Ms Philpott an employee, as she claimed. The things that happened related to the break up of the personal relationship and the business relationship.

[28] For the above reasons I find that: (1) Ms Philpott was a shareholder and a co-owner, despite not being a director, although she was a director for part of the time. (2) There are differences in the evidence over the meaning of the purported employment agreement and purported offer of employment and I find that the documents are more likely to be related to the financing arrangements and not to employment. (3) Ms Philpott never worked for Mr Greenwood in his building inspection business. (4) The letter dated 1 June 2008 is not conclusive proof that Ms Philpott was being dismissed as an employee, but is more likely to mean that the running of the business was being taken over fully by Mr Greenwood in his role as a director.

[29] After the investigation meeting Ms Philpott alleged that her signature on a shareholder's resolution document produced had been forged. This has been raised as a matter for me to consider for credibility. I have certainly taken it into account, but I have given the signature less weight because of the overwhelming evidence relating to the events at the time of the parties' relationship. Also, the shareholder's resolution document was generated well after the relationship between the parties broke down.

Determination

[30] For all the above reasons I am satisfied that Ms Philpott was not an employee. I find that she was a co-owner running the business. Thus, she cannot have a claim to a personal grievance.

Orders of the Authority

[31] Ms Philpott's claims are dismissed.

[32] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority