IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 92
5447585

	BETWEEN	KEITH SMITH Applicant
	A N D	ULTIMATE RESORTS AND PROPERTIES LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	Applicant in person W Bennetti, Counsel for the Respondent
Investigation Meeting:	28 and 29 January 2015 at Whangarei
Submissions Received:	29 January 2015 from the Applicant 29 January 2015 from the Respondent
Date of Determination:	25 March 2015

DETERMINATION OF THE AUTHORITY

A. Keith Smith was not employed by Ultimate Resorts and Properties Limited. The application for personal grievance is dismissed because I do not have jurisdiction to determine the contracting arrangements between parties who are not in an employment relationship.

B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Keith Smith alleges he was employed on or about 1 July 2013 as the General Manager of the Taipa Bay Resort by Ultimate Resorts and Properties Limited (the respondent). He submits he was constructively and unjustifiably dismissed by the respondent on or about 19 October 2013.

Facts leading to dispute

[2] In 2012 Mr Smith was approached by Levin Da Costa, a respondent director, to provide various services advising on the purchase of hotel properties in New Zealand. Mr Smith had some experience in managing motels. He ran a consultancy business known as "The Motel Consultant".

[3] On 5 November 2012, Mr Smith invoiced for work he had undertaken in September, October and November 2012. The invoice recorded "The Motel Consultant" as the payee and described the services provided as *"retainer for September, October and November"*. The total amount invoiced was $2,000.

[4] During this period Mr Smith was employed managing a hotel in Auckland until December 2012. He then managed a motel at Waipu Cove, Northland.

[5] In March and April 2013 Mr Da Costa was considering the purchase of the Taipa Bay Resort. He met with Mr Smith to discuss the provision of advice for due diligence purposes and a management role.

[6] On 11 April 2013, Mr Smith emailed a draft employment agreement to Mr Da Costa. Between April and July 2013, the parties discussed by telephone and meetings the purchase of the Taipa Bay Resort.

[7] On 28 April 2013 Mr Smith invoiced the respondent. The invoice recorded "The Motel Consultant" as the payee and described the services provided as *"Due Dilligence Taipa Bay Resort … Travelling and attending due diligence meetings and associated documentation Taipa Bay Resort"*. There was invoicing for 4 days at $100 per day and travel expenses of $198.00.

[8] On 26 June 2013 the respondent entered into an unconditional agreement to purchase the Taipa Bay Resort.

[9] On 30 June 2013 Mr Smith left Waipu Cove Resort and moved to Taipa Bay Resort. He provided various management services to the respondent. The previous manager remained in residence and continued managing the business until 26 August 2013.

[10] On 26 August 2013, the respondent settled its purchase of Taipa Resort.

[11] On 6 August 2013 Mr Smith invoiced the respondent. The invoice recorded "The Motel Consultant" as the payee and described the services provided as May

"consultancy fees for Taipa Refurbishment" of $500.00 and July *"Project Management fees for Taipa Refurbishment"* of $3,720.00 together with sundry expenses of $2,711.15. He also invoiced another entity, Goan Trust, on 6 September 2014. The invoice recorded "The Motel Consultant" as the payee and described the services provided as *"Project Management fees"* of $4,500.00 together with sundry expenses of $2,550.25. No further invoicing has occurred.

[12] On 30 September 2013, Mr Smith sent a resignation by email to Mr Da Costa. Mr Da Costa refused to accept the resignation which Mr Smith later retracted.

[13] Between 6 and 12 October 2013, Mr Smith travelled to Bali for a family bereavement. During his absence, Russell Masters completed a report on the running of the Taipa Bay Resort. Mr Smith acquired a copy of the report. He disagreed with its findings regarding his services.

[14] On 19 October 2013, Mr Smith met with Mr Da Costa. Following the meeting, Mr Smith sent an email offering his resignation, seeking payment of wages for the September and October and two months wages as compensation. No agreement regarding payment has been reached.

[15] On 24 October 2013, Mr Smith finished work at the Taipa Bay Resort.

[16] A statement of problem was filed on 5 February 2014. The matter is now before me for determination.

Issues

[17] At a teleconference on 12 September 2014 the parties confirmed the following issues were for investigation, namely:

(a) Was Mr Smith an independent contractor or an employee of the respondent?

(b) If he was an employee, was he constructively and unjustifiably dismissed?

Was Mr Smith an independent contractor or an employee of the respondent?

[18] Mr Smith submits he undertook unpaid consultancy work for the respondent for motel advisory services from May 2012 until 1 July 2013. He was paid a $2,000 retainer. His consultancy work then concluded and he became an employee from 1

July 2013. He provided the respondent with a signed copy of an employment agreement which it did not disagree with or provide any alternative to. Invoices were provided in good faith and at Mr Da Costa's behest. He further submits he commenced work on the date set out in the employment agreement and carried out the duties therein. He does not carry third party insurance cover, is not registered for GST and had reasonable expectations that the respondent would pay PAYE on his behalf. He had a fixed place of work and accommodation provided, free of charge, by his employer as per clause 7.4 of the IEA. He used all company facilities in carrying out his duties. Mr Da Costa verbally directed what he did and how it was to be done. He had no control over the quantum of his income because it was fixed by clause 7.1 of the employment agreement. He worked solely for the respondent. He had good reason for believing that he was an employee of the respondent from 1 July 2013 to 19 October 2013.

[19] An employee is *"any person of any age employed by an employer to do any work for hire or reward under a contract of service"* and includes *"a person intending to work"*[1].

[20] Where it is alleged that a person is employed under a contract of service as opposed to an employment agreement, the Authority must determine *"the real nature of the relationship between* [the parties]*"*[2], consider all relevant matters, including any matters that indicate the intention of the parties and must not treat as a determining matter any statement by the persons that describes the nature of their relationship[3].

[21] When considering *"all relevant matters"*, the Authority shall have regard to[4]:

(a) The written and oral terms of the contract, usually containing indications of the common intention;

(b) Any divergence from those terms and conditions in practice;

(c) The way in which the parties have actually behaved in implementing their contract;

(d) Features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

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1 Section 6 Employment Relations Act 2000
2 Section 6(2) Employment Relations Act 2000
3 Section 6(3) Employment Relations Act 2000
4 *Bryson v. Three Foot Six Ltd* [2005] NZSC 34, [2005] NZLR 721, [2005] ERNZ 372 at [32]

[22] When the intention of the parties has to be gathered partly from documents but also from oral exchanges and conduct, the terms of the contract are questions of fact. Industry practice may assist but this is far from determinative of the primary question[5].

[23] It is common ground there was a contract between the respondent and the applicant's consultancy business 'The Motel Consultancy' as evidenced by the invoicing arrangements. I understand Mr Smith to accept this was an independent contracting arrangement up and until 1 July 2013.

[24] If an employment relationship was intended, in absence of a signed written agreement, the terms of employment are a matter of fact. Mr Smith proposes that there was *tacit* agreement to the employment terms encompassed in his draft employment agreement. With respect I disagree. Silence alone does not necessarily evidence consent to a change in arrangements from independent contracting to employment. The parties conduct and their known experience in the hotel industry is relevant to whether there was any agreed change to their contracting relationship.

[25] The parties had an established practice of payment for Mr Smith's services upon provision of invoices. This occurred up and until 30 August 2013. Although the payment arrangements are not necessarily conclusive, they were consistent with the independent contracting arrangements that had existed prior to July 2013.

[26] The invoice dated 5 November 2012 contradicts Mr Smith's submission he was not paid for his consultancy services. It records payment of $2,000. While he may submit he did not fully invoice the respondent for his services, there is no evidence the respondent was aware this was occurring or its significance. The reference to a *"retainer"* in the invoice dated 5 November 2012 would not necessarily signify a reference to alleged future employment.

[27] I do not accept Mr Smith didn't understand the significance of invoicing as opposed to payment of wages. He was an experienced hotel and motel manager. He had his own consultancy business "The Motel Consultant". He gave evidence at hearing he had been retained as a hotel and motel manager both as an independent contractor and as an employee. He gave evidence there was no industry practice of employing managers. His invoices record "The Motel Consultant" as the payee not Mr Smith. They refer to this entity not being registered for GST. The invoice dated 28 April 2013 records invoicing for due diligence work at $100 per day. The 6

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5 See above at [20] and [32]

August and 6 September 2014 invoices show invoicing for consultancy and project management work during the period he was allegedly employed.

[28] The amounts invoiced also do not correlate to the annual salary in clause 7.1 of the draft employment agreement. Further there is no provision within the draft agreement for invoicing the respondent for payment of 'sundry expenses' including wages of other independent contractor builders.

[29] Similarly I do not accept Mr Smith's failure to carry third party insurance or be registered for GST indicates an employment relationship. Mr Smith was not registered for GST when he provided independent contracting services prior to July 2013. There was also no evidence he carried third party insurance prior to July 2013 either.

[30] I do not accept it was reasonable expect the respondent to deduct PAYE. Mr Smith dealt with the Taipa Bay Resort payroll. He accepted at hearing he had made no contact with payroll to set up payment of his salary or deduction of PAYE.

[31] His fixed place of work, use of the respondent's facilities and free accommodation would be expected requirements for an on-site manager. Given his evidence there was no industry practice of employment and managers could be independent contractors, this does not indicate an employment relationship.

[32] I do not accept Mr Da Costa controlled what Mr Smith did. Mr Da Costa had international business interests and was often out of the country. He relied upon consultants to work independently as a consequence. He had some input by way of emails but did not live on site. His offices were in Hamilton. In short he relied upon Mr Smith to undertake any agreed work without interference. Any defects would only be picked up upon the review such as that undertaken by Russell Masters.

[33] It was not until the purchase of the Taipa Bay Resort had been settled and the previous manager had left that there was a hotel management position available. The purchase settled on or about 26 August 2013. The evidence does not support on the balance of probabilities that the parties turned their minds to employment of a general manager of the Taipa Bay Resort at that stage or earlier in with any certainty. There were statements made about resignation in September 2013 at various times but those are not determinative of any employment relationship.

[34] Keith Smith was not employed by Ultimate Resorts and Properties Limited. The application for personal grievance is dismissed because I do not have jurisdiction

to determine the contracting arrangements between parties who are not in an employment relationship.

[35] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority