IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 565
3109172

	BETWEEN	MATTHEW KENNETH BRIAN DOBSON Applicant
	AND	VXJ HOLDINGS LIMITED First Respondent
	AND	CENTRAL CITY TRAVELLERS MARKET LIMITED Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Peter Maciaszek and A J D Margaritis, counsel for the Applicant Peter Foster and Jeff Cowles, advocates for the Respondents	
Investigation Meeting:	1 and 6 October 2021 at Christchurch	
Submissions and further Information Received:	7 October and 28 October 2021 from the Applicant 22 October 2021 from the Respondents	
Date of Determination:	16 December 2021	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Matthew Dobson worked in a variety of roles as a kitchen hand, chef, duty and general manager at the Cave Rock hospitality premises in the Christchurch seaside suburb of Sumner between October 2014 and August 2018.

[2] There is no dispute that he was employed for much of that time. Mr Dobson was initially employed by VXJ Holdings Limited (VXJ Holdings) which company owned the Cave

Rock tavern as part of a body corporate multi-unit development. Mr Dobson entered into an individual employment agreement with VXJ Holdings dated 17 October 2014.

[3] Mr Dobson's second employer when he worked at the tavern was a duly incorporated company called JLS 2016 Limited (JLS). JLS has now been removed from the company register. The sole director of JLS was the previous manager of VXJ Holdings Ms J Lees. JLS managed the business that operated out of the Cave Rock premises in Sumner. The liquor licence was in its name. Mr Dobson signed an employment agreement with JLS however a copy of that was not able be located. Employment with JSL ended on or about 1 February 2018.

[4] It is the third and final period that Mr Dobson worked at the Cave Rock tavern that is the focus of the employment relationship problem. Mr Dobson says that he was employed by Central City Travellers Market Limited (CCTM) from in or about late February to 21 August 2018 as a general manager. He says that his resignation from CCTM effective 21 August 2018 was in the nature of an unjustified constructive dismissal. He seeks holiday pay, unpaid and lost wages, compensation and costs.

[5] Peter Foster is the sole director and shareholder of both VXJ Holdings and CCTM.

[6] CCTM does not accept that it employed Mr Dobson when he worked at the Cave Rock premises. It says that he operated a business called Auberge in partnership with another person who did not give evidence. I shall refer to her as Naomi. CCTM does not accept that the Authority has jurisdiction to hear the claims and/or that Mr Dobson is entitled to any remedies.

[7] The relationship Mr Dobson had with the first respondent VXJ Holdings forms part of the factual matrix. The focus for the Authority is on the relationship Mr Dobson had in 2018 with the second respondent CCTM.

[8] There was a considerable amount of material provided to the Authority for its investigation. I have considered it all carefully. I record that under s 174E of the Act the Authority is not required to record all of the evidence heard or received or record or summarise submissions.

The issues

[9] The main issue for determination is whether Mr Dobson was an employee of CCTM.

[10] Section 6 of the Employment Relations Act 2000 defines an employee. The material parts of section 6 are set out below:

> **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.

[11] The Authority needs to consider the following matters to determine the real nature of the relationship between Mr Dobson and CCTM:

(a) How did the relationship commence?

(b) Is there anything in writing about its nature?

(c) How did the relationship work in practice?

(d) What does an assessment of all relevant matters in the relationship indicate including:

(i) The intention of the parties?

(ii) Aspects of control and integration?

(iii) Whether Mr Dobson was effectively working on his own account?

(e) If the finding is that Mr Dobson was not an employee then the Authority will have no jurisdiction to determine his claims in relation to his personal grievance, holiday pay and unpaid wages; and

(f) If he is an employee then the Authority does have a jurisdiction to investigate those matters.

(g) The Authority will then need to determine what the reasons were for Mr Dobson's resignation.

(h) Whether the resignation was caused by breaches of duty on the part of CCTM?

(i) If there were breaches of duty on the part of CCTM then were they of a serious nature that would mean it was reasonably foreseeable that Mr Dobson would not be prepared to continue to work for CCTM.

(j) If there was a constructive dismissal then was it justified?

(k) If there is an unjustified constructive dismissal then what remedies should be awarded and are there issues of contribution and mitigation?

(l) Is there money owing for holiday pay and unpaid wages.

The commencement of the relationship between Mr Dobson and CCTM

[12] There was some concern about the operation, management and profitability of the Cave Rock tavern business in 2017 when it was managed by JSL. Jeffrey Cowles who has experience in the hospitality industry was asked by Mr Foster to undertake investigations and report on the state of the business.

[13] Ultimately steps were taken to end the management contract with JSL from 1 February 2018. CCTM took control and ownership of the business and obtained a temporary liquor licence for the premises from 1 February 2018 pending a full liquor licence. It took other steps to reflect its ownership with respect to bank accounts, TAB licensing, supplier accounts, payroll and points of sale such as Eftpos.

[14] It was understood before 1 February 2018 there was a likelihood Mr Cowles would manage the business potentially with his son's involvement. A meeting on 31 January 2018 took place between Mr Cowles and the staff of JSL. Employment agreements for employment with CCTM were presented by Mr Cowles to the employees present. Mr Dobson says that he signed an employment agreement and gave it to Ms Lees the day after the meeting.

[15] Mr Cowles elected for a variety of reasons very shortly after the staff meeting not to continue with his proposed involvement with the business. He was not thereafter directly involved with Mr Dobson during the material period the Authority needs to consider.

After 1 February 2018

[16] The evidence supported there was an element of uncertainty in February 2018 about what would happen to the Cave Rock tavern when it was known that Mr Cowles would not be involved. Mr Cowles' evidence is that Ms Lees continued to have some involvement at the tavern after 1 February 2018 but later in the month she travelled to the North Island and had no further involvement.

Employment agreement signed on or about 1 February 2018 with CCTM

[17] I have considered the relevance of any employment agreement Mr Dobson says he signed with CCTM in early February 2018 and whether Mr Dobson was a person intending to work for CCTM at that time. That would require that he was offered and accepted employment with CCTM. Mr Dobson recalled Mr Cowles said he needed to interview employees. Mr Cowles also made it clear there was a level of uncertainty whether he would be involved in the business from 1 February 2018 and what would be happening. He said in his evidence that he indicated to employees that they would need to apply for roles. I conclude it likely that any offer of employment was conditional.

[18] I could not be satisfied from the evidence that Mr Dobson at the time he signed the employment agreement in late January or early February 2018 was a person intending to work for CCTM.

[19] The nature of the relationship between Mr Dobson and CCTM properly falls to be considered from late February 2018 until the date Mr Dobson resigned on 7 August 2018.

Benefit to VXJ Holdings and CCTM to have a business operating in the Tavern

[20] Mr Margaritis submits there was a benefit to VXJ Holdings and CCTM in keeping the business of the tavern going to enhance the value of the property for the unit title process or in the event of a sale. Mr Cowles in a statement provided to the Authority with the statement in reply expressed the benefit if the "…outlet was operating rather than derelict and closed." He referred to continued operation of the tavern making a large price offer difference.

[21] The Authority was directed to a 2019 High Court judgment.[1] VXJ Holdings was a party to the proceedings as a respondent and cross applicant. The complex in which the tavern operates was damaged in the Canterbury earthquakes. It comprised 49 residential units, the tavern and a basement carpark. The tavern which was unit 50 was one of the very few units which was still able to be occupied.

[22] 46 of the 50 unit owners in the Cave Rock Apartments which number did not include the unit owned by VXJ Holdings sought from the High Court approval of a settlement, cancellation of the unit title arrangement and an order requiring the four unit owners which included the tavern to sell their units under an existing sale offer joining with the Body Corporate and the rest of the unit owners. One of the areas of dispute identified was the market value of the tavern involving capitalisation of the appropriate market rental.

Email dated 21 February 2018 from Ms Lees

[23] On 21 February 2018 Ms Lees sent an email to Mr Foster advising that Mr Dobson and Naomi wanted to have a chat with him as they were keen for the Cave Rock to work. Ms Lees set out in her email that they were working on a business plan to put to him and set out some of the ideas Mr Dobson had about menus and Naomi's background and relevant studies. Ms Lees stated in her email that this can all be done on a three month trial then if it is showing profit for six months. The email concluded with an expressed hope that Mr Foster would be the main person at the Cave Rock as he would see the bankings and reports and it would not cost him anything to put this on trial for three months. Mr Dobson in his evidence to the Authority said that he had not seen the email from Ms Lees until it was provided as part of these proceedings initially with the statement in reply. What came to pass was not inconsistent with the email.

Business plan and concept design presented

[24] A meeting took place after the email from Ms Lees between Mr Foster and Mr Dobson and Naomi at which they provided their business and concept design plan to Mr Foster. Mr Dobson recalled Mr Foster saying that the plan was "a good idea." I will set out parts of that plan below.

---

[1] *White v VXJ Holdings Limited* [2019] NZHC 3095.

Objectives

[25] Under a heading objectives there is reference to the months of March to June and bullet points under each month. For March there are six bullet points including a handover, staff recruitment and re-opening by March 24th. Under May there is reference to financial forecasting "past the 3 month point" and lease ownership negotiations and under June it states "Move forward with the concrete business concept, and onto success!"

Company ownership and legal entity

[26] Under a heading company ownership and legal entity it provides as follows:

> The Cave Rock would continue to operate under the same license and ownership, with the goal of extending the sole proprietor form into a partnership between several owners. The 'Bodacious Social Club' business design and model would be owned by a separate entity, and all rights to the concept plan and business name remain in the possession of creators Naomi ---- and Matthew Dobson.

Management

[27] Under a heading management it set out that Mr Dobson was the general manager, Naomi bar manager and there were names of two potential duty managers.

Was there anything in writing about the nature of the relationship?

[28] The information in writing about the relationship between CCTM and Mr Dobson for the material period between March and 7 August 2018 when the relationship ended is limited. There is no written employment agreement or other agreement entered into between the CCTM and Mr Dobson. There is no evidence of a written partnership agreement between Mr Dobson and Naomi. There is the business plan I have referred to earlier and some later documentation around a loan agreement that I will come to.

The relationship in practice

Emails between Mr Foster and Mr Dobson in late February/early March 2018

[29] Mr Dobson provided a series of emails between him and Mr Foster after the presentation of the business plan.

[30] In an email dated 27 February 2018 Mr Dobson advised that he is working out opening hours and required staff and that he had contracts ready for signature. He asks Mr Foster for input on hourly rates for bar staff, duty manager and chef and whether Mr Foster required him [Mr Dobson] to be on a salary or hourly wage. Mr Foster advised by email dated 28 February that the main issue was keeping costs within the 25% maximum based on turnover and he said they would discuss the pay for Mr Dobson the following day.

[31] In an email dated 28 February 2018 Mr Dobson advised the time he was to be at work and that the representative from Lion Nathan was meeting with him. He asked if the new account is set up as he needed to place an order. He records that they are low on stock and asks Mr Foster if he would be able to attend the meeting in case any paperwork needed finalising.

[32] In an email dated 3 March 2018 Mr Dobson advises that he had been very busy to get things on track at the tavern. He wrote that there was a lack of items to keep the place running and he wondered about an expense account for items such as cleaning cloths and emergency alcohol. He also set out that he had bought four boxes of Speights to get through. He noted that he had to take money from the banking the day before but there were receipts to balance out.

[33] Mr Foster responded on 4 March 2018 and advised that he would bring some cash down so that Mr Dobson could get what he wanted. He noted that the Eftpos was not hitting the account and he would check again. Further that he had asked Ms Lees for some items and information.

[34] In an email dated 6 March 2018 Mr Dobson advises Mr Foster that he has spoken to Ace Payroll and has been advised of the purchase of the software initially in 2014 by VXJ Holdings and then JSL was added. He refers to new software to be launched in April and sets out two options for Mr Foster with his views on each. He notes that he has downloaded the new software onto the laptop and there is a free trial period. He sets out that he needs the employer name (CCTM) and the IRD number for the company.

[35] Mr Foster replies by email dated 6 March 2018 and provides the IRD number for CCTM. He also advised he has put $10,000 into the bank account.

[36] Mr Dobson sent an email to Mr Foster on 10 March 2018 advising him that he has assembled a team for the bar and has two chefs on board. He states that he has sorted the wages of the bar staff as previously discussed but not his and the chefs. He asks whether $25 per hour would be acceptable for him [Mr Dobson] and for Mr Foster's thoughts. He writes that he thinks the "rebrand is going to totally work for us." He notes he paid a staff member in cash as the Ace Payroll has still not activated and sets out that he and Naomi have not taken a wage yet.

[37] Mr Foster responds by email dated 10 March 2018 to Mr Dobson. He advises of the serial number of Ace Payroll. With respect to the wages he asks whether he can sit with Mr Dobson for a bit before we pull "the trigger." He notes that the wages seem right for the chefs but he would like to put them to the test to see cooking and presentation. He sets out that he believes this will be a substantial revenue area and that it "would be great to be the front runners around Sumner." He states that he needs to call the body corporate to make sure they are not going to "drop a bomb on us." Further that he considers they should re-run all the wages on Ace Payroll and adjust the funds programme from the advance payments so the records are "spic & span." Mr Foster wanted Mr Dobson to keep up "the great work."

[38] In an email dated 13 March 2018 to Mr Foster, Mr Dobson advises that he is still trying to process payroll from the previous week. He asked for information about the bank account the company is using and referred to being "so stressed."

[39] Mr Foster responded by email of the same date and asks for staff names and those with manager's certificates and the numbers on the certificates for the full license application. He advises Mr Dobson not to stress as they can go to the bank on Friday and get all the bank matters sorted. He states that Mr Dobson may like to go with him to a meeting with the council for the licence application.

Autonomy

[40] Beyond the early exchanges and meetings to get matters up and running in late February and early March 2018 Mr Foster had little involvement with the day to day running of the tavern. Mr Dobson said that he would go on a monthly basis with the book keeping and banking records to see Mr Foster at his home. Mr Foster did not accept that evidence was correct. He said his interactions with Mr Dobson were very limited. He agreed in evidence that the bank sent CCTM bank statements to his home. Mr Dobson described in his oral

evidence operating fairly autonomously to Mr Foster but that he did "the big stuff through him." Mr Dobson had signing authority for the CCTM bank accounts. He was the holder of a Debit Mastercard account with the bank used for the purposes of the business in the name of CCTM.

Auberge

[41] The evidence supported Mr Dobson and Naomi moved to rebrand the business Auberge. Mr Foster had knowledge of this. Food was ordered using the name Auberge and a loan agreement for a coffee machine and grinder in the trading name Auberge signed by Mr Dobson and Naomi as lessee on 11 April 2018. Some staff documents were rebranded with the Auberge name.

Employment agreements for staff

[42] Mr Dobson recruited and signed several employment agreements with new staff. In his oral evidence he referred to employing six or seven staff and entering into the employment agreements on behalf of the company. Some of the agreements that Mr Dobson signed for employees in March and June refer to the employer as Auberge. One employment agreement that the Authority was provided with described the employer as Cave Rock and one described the employer as Mr Dobson. The evidence did not support he prepared an employment agreement for himself.

Responsibility

[43] Mr Dobson had considerable responsibility. He had to manage creditors, acquisition of stock, payment and recruitment of staff and payment of debt. He remained concerned throughout the period he was working that there were insufficient funds to operate and pay wages.

Payments

[44] The evidence supports that Mr Dobson attended to payment of himself and staff. He provided a management report for CCTM for the week ending 27 March 2018 that shows he and Naomi were listed as "itemised employees."

[45] His Inland Revenue Department (IRD) record of earnings for the material period shows wages from CCTM for the month of March 2018 and nil balances for the other months. Mr Dobson said that he understood an employer could elect to account for PAYE yearly at that time and that this was done in consultation with Mr Foster. Mr Foster in his evidence said that he was unaware that PAYE, Kiwi saver and student loan repayments were not being accounted for over this time to IRD for Mr Dobson and other employees.

[46] The evidence supported there were 22 weeks when payments in the nature of wages were paid to staff and Mr Dobson from the CCTM account. Mr Dobson's bank statements which were provided to the Authority show payment to him of money referred to as wages, Auberge and Auberge wages for the period that he worked. There is some variation to the amount paid each week to Mr Dobson. Mr Dobson said that he filled in a timesheet and was paid at $25 per hour. I accept it is more likely than not that payments made to Mr Dobson in his bank account are net payments because of the amounts paid.

Request to Mr Foster for a loan

[47] Mr Foster in final submissions provided an email from Mr Dobson dated 30 April 2018. It had not been provided at the time of the investigation meeting. There was an opportunity to address this in submissions in reply.

[48] The subject of the email was "budget requirements". The email stated amongst other matters that "we ask for a loan of $20,000 to cover "our start-up costs". Ten items were set down in the email as to what was required. This included signage, chairs, menus, advertising, food cabinets, stock, essential kitchen items, bar items, décor and working capital. The email ended with the goal to get the best deal on everything without compromising on quality and then to "get money coming in and pay you back!"

Loan document

[49] In or about May 2018 Mr Dobson and Naomi were presented with a loan document from Mr Foster with the lender described as VXJ Holdings and the borrowers Mr Dobson and Naomi. An advance of $20,000 was set out in the agreement for the "Express purpose of providing working capital to operate their business Auberge a restaurant and tavern."

[50] The first part of the advance was to be made by a payment into the account of CCTM with $10,000 available on 4 May 2018 and further advances at call. The loan was for a period ending on 30 June 2019 to be repaid with interest calculated at 5% to the account of Mr Foster.

[51] It was set out that the advance was made jointly and severally.

Response sent by Mr Dobson 22 May 2018

[52] On 22 May 2018, Mr Dobson responded to Mr Foster by email. He stated that "we feel it would be a mistake to sign the loan agreement in the way it is currently presented." The email noted that it was worded as a personal loan with the purpose of providing working capital to operate their business but that it was "not our business. Not at this stage".

[53] Mr Dobson set out in his email that everything had been set up as CCTM before "we pitched our idea" to Mr Foster. He wrote that CCTM has one director and shareholder Mr Foster and they were being asked to sign a personal loan from him to a company he owned. Mr Dobson wrote that he could not see as manager of the business he could reasonably be expected to agree to a loan on a personal basis for this purpose. Mr Dobson stated that at no point was it discussed that he and Naomi would be business owners from the outset and that it was not a viable option at this stage.

[54] Mr Dobson wrote that he and Naomi were in a position where they could drive and manage the business on behalf of Mr Foster but were not in a position to assume control or sign documents taking accountability for a business loan to a business they had no ownership over. Mr Dobson wrote that he came on board to manage the business on behalf of Mr Foster and every document, credit arrangement and service contract had been signed by Mr Foster and he could not legally see why as a manager he was asked to sign a loan agreement.

[55] Mr Dobson set out a counter-proposal that VXJ Holdings advance to CCTM the sum of $20,000 to provide start-up capital for the business Auberge. There was also a suggestion that interest be paid to Mr Foster as a preferential creditor to be paid from the CCTM Limited account with revenue generated from the business Auberge. There was also reference to an annual profit split after tax from the business.

Mr Foster responds 22 May 2018

[56] On 22 May 2018 Mr Foster responded to Mr Dobson's email and stated in an email that he had read what he and Naomi had said. He wrote that the loan was requested to run the business and that he had given Mr Dobson and Naomi his undertaking that they would have 90 days to show that they are on the "right track." He stated that he had made it clear that he did not want to provide any more funds for any party but has been generous enough to do so to help them over the "hurdle." He wrote that they could apply for a lease and that he had told them he did not want any profit from trading but wanted rent and outgoings paid. He noted that they had the chattels without charge and this was unusual. Mr Foster said that they could have shares in CCTM for their valuation and they would both be directors and do their own thing. Mr Foster referred to the company as "clean" without any liabilities. He suggested that they sit together to sort out "where you still want to go" and have that documented so that all parties are comfortable with the arrangement. Mr Foster stated that he was away from 3 June and not back until 8 July.

[57] On 22 May 2018 Naomi signed the loan agreement but it was changed in several respects to show the borrower as CCTM and the name of Mr Dobson and Naomi crossed out. The reference to "their business" was changed to the business Auberge. Mr Dobson did not sign the loan agreement.

[58] The money was paid into the trading account of CCTM. Mr Foster said that before this he was told all accounts had been paid up to date and that there would be a cash surplus. Mr Dobson said that the money deposited was used for rebranding, signage, refurbishing and replacing stock. He said that they managed week by week but there were limited funds in the account. When Mr Foster returned from his cruise Mr Dobson was told there would be no further funds introduced and he had to make payments from the daily transactions.

[59] Mr Dobson said that on 4 August 2018 he was exhausted and did not go to work. He then received an email from Naomi that was critical of him and on 7 August provided his letter of resignation to Mr Foster stating that he was resigning his position at CCTM from 21 August 2018.

An assessment of relevant matters in the relationship

[60] Guidance as to all relevant matters can be found in the Supreme Court judgment in *Bryson v Three Foot Six Limited (No. 2*).[2] It was stated in upholding the decision of the Employment Court:

> "All relevant matters" certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" "equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person had been effectively working on his or her account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration, and fundamental test …

Intention of the parties

Mr Dobson's view of the relationship

[61] Mr Dobson said that he was at all material times an employee of CCTM and that although he had a lot of responsibility he was answerable to and reported to Mr Foster. He says that there was a plan or a potential option only to buy into or acquire the business and no progress toward that was made before he resigned.

Mr Foster's view of the relationship

[62] Mr Foster's view from his evidence was that Mr Dobson and Naomi had a partnership and the partnership was taking over the business of the Tavern. He wrote in an email to Mr Maciaszek in August 2018 that the interest in the Tavern was to be "100% theirs" and the only agreement was to give them a three month rent holiday before giving them a formal lease. He denied in his evidence having any intention to employ Mr Dobson. He stated in a document provided to the Authority with the statement in reply and described as an affidavit that he would

[2] *Bryson v Three Foot Six Limited (No. 2)* [2005] 372 (SC)

not have signed any employment contracts with Mr Dobson as he has a "serious aversion to this type of commitment."

[63] I do not conclude a common intention about the relationship.

Control

[64] The control test examines the degree of control exerted over the work of the individual including what work is done and how it is done. The greater the degree of control the more likely a contract of service (employment agreement) exists but some elements of control are also found in contract for service (independent contractor).

[65] The emails between Mr Dobson and Mr Foster at the start of the relationship favour a relationship in the nature of employment. Mr Dobson discussed with Mr Foster his hourly pay rate. He checked what rates staff should be paid and how the Ace Payroll system with the employer named as CCTM and the company IRD number should be set up. He keeps Mr Foster up to date with what was happening at that time. Payments of wages are identifiable from the CCTM bank account however staff appear to have been paid in cash. Mr Dobson gave evidence of recording hours worked on a timesheet although the timesheets were not provided. The first cash injection of $10,000 was made by Mr Foster without any suggestion that it was in the nature of a loan.

[66] After the initial period in late February and early March 2018 and the emails as set out above Mr Foster appeared to have little further interest in the day to day running of the business. Accordingly his exercise of any control was minimal day to day.

[67] Mr Dobson operated in the general manager role with few controls. The evidence supports he struggled with trying to keep the business solvent and pay staff and make other necessary payments. Mr Dobson said in his evidence at the Authority investigation meeting that he would bank takings for the day after midnight so payments could be made the next day. On occasions Mr Dobson's own bank account shows that he was paid what was described as part wages which were made up at a later date to the full wage for the week. His wages are shown as deposited weekly.

[68] As Mr Cowles submits there are aspects of Mr Dobson's day to day managing that are not in line with the controls of an employment relationship. Whilst not inconsistent with the role of general manager Mr Dobson was able to employ staff without recourse to Mr Foster.

He used Auberge on a number of occasions for the employer name and on one occasion named himself as the employer. He used Cave Rock in one agreement. There was no evidence to support Auberge was a legal entity.

[69] When Mr Dobson provided his bank statements they showed one deposit of $3170 from the CCTM account into his personal account in late May 2018. Mr Dobson said in evidence that he used that money to pay staff in cash and provided a signed receipt from a number of staff for that period although it did not set out the amounts each staff member received. This type of transaction is inconsistent with how an employee would behave but it was the only payment of that nature into Mr Dobson's bank account that could be seen. That money was moved from the CCTM accounts to pay staff on that occasion was not altogether inconsistent with Mr Dobson's evidence about the challenges paying staff with a business close to insolvency.

[70] Whilst the day to day controls on Mr Dobson were few CCTM had controls at a higher level. CCTM owned and had control of the business. The liquor licence was in its name. Key liquor supply agreements such as that with Lion Breweries were with CCTM. Payments of staff were made through CCTM's bank account. This can be contrasted with how the tavern business had operated under JSL from whom CCTM took back control and ownership of its business.

[71] The control test is reasonably finely balanced in this matter. There were very limited controls exerted on Mr Dobson in his day to day management and that weighs in favour of a contract for services. There were however higher levels of control by CCTM. These coupled with the communications by email in late February and early March 2018 between Mr Foster and Mr Dobson demonstrate some controls and weigh towards an employment relationship. Those early communications viewed with the contents of Mr Dobson's 22 May 2018 email are not inconsistent with how he saw his role to manage the business on behalf of Mr Foster.

Integration

[72] The integration test concerns an assessment whether the work performed is an integral part of the business which would be the situation with employment or whether work undertaken is not integrated into the business but is accessory to it which would reflect a contract for services.

[73] As general manager Mr Dobson performed a fundamental role at the hospitality premises. He used the existing chattels as noted by Mr Foster in his email of 22 May 2018. Whilst the trading name Auberge was used for some food and related orders Mr Dobson also communicated on behalf of CCTM in his management of the premises in ordering alcohol and with the bank.

Was Mr Dobson effectively working on his own account?

[74] As set out earlier there were some advantages to Mr Foster in keeping the business going after 1 February 2018. Mr Foster stated in an email to Mr Dobson on 22 May 2018 "I could have just shut the doors after [Ms Lee's] departure but your request was considered and I think that you can make a good base and income for yourself." There were advantages no doubt for Mr Dobson in being able to continue to work at the tavern in which he had worked for a number of years.

[75] The business plan was forward looking beyond an initial period and refers as an objective in June to moving forward with the "concrete business concept." It was also clear that the Cave Rock tavern would continue to operate under the same licence and ownership at least in the interim.

[76] There was no evidence of a full review at the three month point about how the business had been performing although with the benefit of hindsight that would have been sensible. No formal lease was ever entered into and rent was never paid by Mr Dobson. Mr Dobson's evidence was that after Naomi signed the loan agreement on 25 May 2018 she appeared to have a different view about business ownership than Mr Dobson did. The evidence supported there was some distance between them and Mr Dobson said he became less clear as to what was happening. He considered Naomi may be discussing matters separately with Mr Foster.

[77] The relationship between Naomi and Mr Dobson was seen by Mr Foster as a partnership but there is nothing in writing that recorded they were in partnership and how that may operate. Partnership between owners was expressed in the business plan but only as a goal. Both Naomi and Mr Dobson had roles in the business plan for which Mr Dobson was paid an hourly rate he had discussed with Mr Foster.

[78] There was no evidence that Mr Dobson took any financial risks as a business owner would. He did not invest his own money into the business. He was resistant to the offer of a loan which would mean he was personally liable with no rights or ownership in the business of CCTM. There was no evidence that he achieved any financial benefit beyond wages from managing a struggling business that was close to insolvency.

[79] There was evidence of payment to Naomi of wages from the CCTM bank account in March. PAYE was deducted from Mr Dobson's income from March. As set out earlier the bank statements support Mr Dobson was paid net amounts for wages however PAYE was not accounted for to IRD for the other months he received wages from the CCTM account. The business was operated through the CCTM bank accounts.

[80] There was no evidence of any formal agreements between CCTM and Mr Dobson/Naomi reflecting ownership.

[81] When Mr Dobson decided not to continue working at Cave Rock he tendered his resignation to Mr Foster from his position with CCTM. Some weight was placed by Mr Foster and Mr Cowles on an email Naomi had sent Mr Dobson on 6 August 2018 in which she wrote that she has had to "assume his resignation." She writes amongst other matters that "In hindsight, I would not have gone into business with someone so inexperienced." In the same email however she also refers to providing a reference to his character and the nature of his departure from "this employment."

[82] There was a plan presented that if all went well within the first few months Mr Dobson and Naomi may take steps to acquire some interest and rights in the business owned by CCTM. They took steps taken to rebrand and operate the tavern largely without the involvement of Mr Foster.

[83] The economic reality of the relationship was that the business was owned by CCTM. The responsibilities, as Mr Margaritis submits, for the liquor licence and other statutory compliance issues including tax were with CCTM and its director Mr Foster. The business plan and concept ideas presented by Mr Dobson and Naomi did not progress to the point where Mr Dobson was effectively in business on his own account. Mr Dobson was managing the business on behalf of CCTM and Mr Foster.

[84] This test favours a contract of service.

Conclusion about whether Mr Dobson was an employee

[85] In the absence of a common intention I am not satisfied that Mr Dobson operated a business in partnership with Naomi or was otherwise effectively in business on his own account when he worked at the Cave Rock hospitality premises from late February 2018 until 6 August 2018. Some aspects of control do not favour employment but it was not a relationship with no controls at all. Mr Dobson was integrated closely in his management role with CCTM.

[86] For the reasons set out above I conclude that the true nature of the relationship was that of employee and employer.

[87] The finding means that the Authority can proceed to consider the other claims.

Legal approach to a constructive dismissal

[88] In some circumstances a resignation may amount to a dismissal. As was stated in the Court of Appeal judgment in *Wellington Clerical Union v Greenwich* by Judge Williamson:[3]

> There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[89] There were three situations listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:[4]

(1) Where the employee is given a choice of resignation or dismissal;

(2) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(3) Where a breach of duty by the employer leads a worker to resign.

[90] It was stated by the Court of Appeal that the conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can also be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and employee.

---

[3] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975
[4] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374

[91] Mr Dobson relies on the third situation as described by the Court of Appeal in *Woolworths*.[5]

[92] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.[6] In determining that matter, all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found by the employer, was of sufficient seriousness to make resignation reasonably foreseeable.

[93] Mr Dobson has the burden of establishing that the resignation was actually a dismissal.

What were the reasons for resignation?

[94] Mr Dobson's letter of resignation simply advised that he was resigning from his position at CCTM effective from 21 August 2018.

[95] He says in his evidence that the reason for dismissal was that he was put under pressure by Mr Foster after he refused to sign the loan document and the environment became unpleasant and he always felt uncomfortable. Further that on return from a cruise Mr Foster advised that he would not be injecting any further money into the business. Mr Dobson refers to bullying and coercion by Mr Foster and Naomi over several months.

[96] On 4 August 2018 Mr Dobson said that he was exhausted and did not go to work. He then received a letter from Naomi in which she was critical of him and she blamed him for the financial state of the business. Further she told him that he was not allowed any outstanding pay and was "replaceable" which was a phrase he said Mr Foster has also used.

Whether the resignation was caused by breaches of duty on the part of CCTM?

[97] The bullying allegations leading up to the resignation were not specific and the general allegations of bullying were denied. The written communications from Mr Foster during the relationship objectively assessed were not of a bullying nature and the loan document whilst unsatisfactory to Mr Dobson followed a request from him for funds. Mr Dobson never signed

---

[5] Above n 2.
[6] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

the loan agreement but the funds were deposited into the CCTM account. I weigh that Mr Foster was hardly ever at the Cave Rock tavern and was away for much of June until 8 July 2018. His face to face interactions with Mr Dobson I conclude from the evidence were really very limited. He essentially left the day to day running of the tavern to Mr Dobson.

[98] Mr Dobson says that he was knowingly put into a position where Mr Foster caused him harm to his mental well-being and health. On an objective basis it was more likely that it was after the relationship ended that Mr Dobson became aware that there was some hurtful talk about him around Sumner. He also received calls and letters from debt collection agencies after his employment ended about tavern debts for periods that he had not worked which caused him distress and worry. A notice of demand dated 13 September 2020 was served on Mr Dobson care of Mr Margaritis for the loan money. There was a threat in the demand notice that the police may be involved.

[99] I accept Mr Margaritis's submission that Mr Cowles and Mr Foster were consistently, after the relationship ended, very disparaging of Mr Dobson's ability to run the tavern but appeared to take little or no interest in what was happening even though CCTM was the owner of the business with ultimate liability.

[100] From all this Mr Dobson was impacted to the extent that he required a reasonably sustained period of counselling from in or about November 2018. I was not able to conclude that whilst Mr Dobson was employed Mr Foster clearly knew about the impact on his mental health from the day to day management of the business.

[101] Mr Dobson's relationship with Naomi appeared to have become strained and he was unclear what she intended to do. She blamed him in an email for the financial state of the business. I do not conclude the deterioration of that relationship was a breach on the part of CCTM.

[102] Mr Foster was not going to introduce further funds into the business although I do not conclude that a company director making a decision not to continue to inject funds could be considered a breach.

[103] The different views the parties had of the relationship were never properly resolved whilst it was on foot and indeed after it ended. Mr Foster did suggest some discussion in his 22 May email about where Mr Dobson and Naomi wanted to go and get that documented however the evidence does not support that occurred at least with Mr Dobson.

[104] I also consider Mr Dobson may have resigned somewhat prematurely before talking to Mr Foster about his concerns particularly given his role as a general manager. He recalled Mr Foster was surprised to receive the resignation.

[105] I am not able to conclude that the resignation was caused by breaches of duty by CCTM whilst the relationship was on foot or if there were breaches that they were serious breaches of duty in all the circumstances. I do not find that Mr Dobson has made out his claim that his resignation was as the result of serious breaches and in the nature of a constructive dismissal. For completeness the evidence did not support the resignation was foreseeable.

Unpaid wages and holiday pay

Unpaid wages

[106] The evidence about unpaid wages concentrated on the period from 4 August 2018 when Mr Dobson was on sick leave. Mr Dobson resigned on 7 August 2018 effective from 21 August 2018. The evidence was that he remained on sick leave for his notice period and although asked to attend a meeting with Mr Foster and Naomi he did not do so. He was not entitled to sick leave at that time as he had not completed six months of continuous service under s 63A of the Holidays Act 2003 and I make no award for that period for unpaid sick leave.

Holiday Pay

[107] Mr Dobson is entitled to holiday pay.

[108] As the employment ended within 12 months holiday pay should be calculated in accordance with s 23 of the Holiday Act 2003 which is 8% of gross earnings less any paid annual holidays taken in advance.

[109] The $1720 which Mr Dobson claims under this head appears to be calculated on a different basis.

[110] Mr Dobson is to provide a further calculation for holiday pay in accordance with s 23 of the Holidays Act 2003. If the Authority agrees then it will make orders. It will also order interest payable as claimed in the statement of problem. The Inland Revenue PAYE calculator may be of assistance to convert the net wages to the gross wages for the months other than March 2018. The calculations for holiday pay are to be provided at the same time as the applicant's submission as to costs.

Costs

[111] I reserve the issue of costs. As the end of year and holiday season is rapidly approaching the applicant's submissions are to be lodged and served by 21 January 2022 and the respondents' submissions are to be lodged and served by 4 February 2022.

Helen Doyle
Member of the Employment Relations Authority