**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI**
**TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 101
3180539

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| BETWEEN | CHRISTINE MORRISON<br>Applicant |
| AND | C & C GISBORNE LIMITED<br>Respondent |

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| Member of Authority: | Michael Loftus |
| Representatives: | Kirsten Westwood, advocate for the Applicant<br>Neil Smoker, advocate for the Respondent |
| Investigation Meeting: | 30 November and 16 December 2022 at Gisborne |
| Submissions Received: | At the investigation meeting |
| Date of Determination: | 3 March 2023 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Christine Morrison, claims she was unjustifiably dismissed by the respondent, C & C Gisborne Limited (C&C), on 8 November 2021. She also claims to be due unpaid wages.

[2] C&C denies the claims but more importantly says the Authority lacks jurisdiction to determine them as it never employed Ms Morrison.

**This Determination**

[3] The Authority heard from Ms Morrison, her husband Valentine and her accountant who had also been C & C's accountant but felt he had to withdraw from that role when conflict

arose between Ms Morrison and other directors/shareholders. C&C chose not to offer any evidence but instead relied on the facts as they emerged and its submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

**Background**

[5] In 2013 Ms Morrison and her husband purchased a small bar and gaming business in Gisborne which operated as VCM Limited. She worked in the business as required and also managed its human resource issues.

[6] The Morrisons leased the bar premises from a local businessman who also owned several surrounding properties. One of those was the Westlake Hotel which the businessman and his wife managed. In 2014 that couple moved to Auckland which lead to an arrangement under which the Morrisons ran the hotel business on their behalf.

[7] Westlake Hotel provided accommodation for short stays as well as longer terms which meant Tenancy Services considered it a boarding house. The arrangement saw the Morrisons live onsite and they were paid a percentage of the business' profit.

[8] In late 2018 the Morrison's sold their bar and gaming business but continued running the hotel. Then in early 2019, Simon Ong and his wife, Geck Kuan Tan, purchased the hotel's lease. Following some discussions Mr Ong, Ms Tan and the Morrisons decided to establish C & C Gisborne Limited and have it run the hotel. All four were both directors and shareholders, though the Morrisons' joint holdings totalled a minority interest.

[9] Ms Morrison says her role as manager of the Westlake Hotel was to continue and it was agreed that initially she would be paid $30,000 with this being reviewed after six months. She says she also completed an IR3 form which Mr Ong took to his accountant. She says payment was made by direct credit which was arranged by the accountant who, she says, also took care of any tax. There was, however, no employment agreement.

[10] In March 2021 a dispute arose between Ms Morrison and Mr Ong which led to the latter engaging Mr Smoker who subsequently took over the preparation of C&C's accounts.

[11] The dispute continued to fester until 8 November 2021 when Ms Morrison met with Mr Ong and, according to her, was simply given the unheralded news that she "… was not a director anymore and so had no job and I am not an employee or words to that effect" and a new employee would be "transitioned" into her role.

[12] That was followed by an email exchange initiated by Ms Morrison on 10 November. In her email she cites the above advice but also notes her access to the bank accounts had been cut off, that she had not been paid and asks for clarification as to what was happening with her role. Ms Tan, responded the following day asking Ms Morrison "cooperate with the moving forward process", provide various pieces of information about the hotels operation and advise how her salary was paid.

[13] A further two days later both Ms and Mr Morrison ceased to be directors but both remain shareholders, albeit still minority ones.

**Analysis**

[14] There are, potentially, two issues to be determined. The first is the whether or not Ms Morrison was an employee because if not the Authority lacks jurisdiction to consider her substantive claims. The second issue, provided she was an employee, is whether or not she was unjustifiably dismissed and/or owed wages.

[15] That said C&C does not dispute that if Ms Morrison was an employee it would have little chance of defending the unjustified dismissal claim and nor does it deny money is owing. In essence these claims will be determined by answering whether or not Ms Morrison was an employee?

[16] Section 6 of the Employment Relations Act 2000 stipulate the meaning of employee. The material provisions state:

> *(1) In this Act, unless the context otherwise requires, **employee** —*
> *(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; …*
>
> *(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 a person; and*
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[17] The issue of what *all relevant matters* means was discussed in *Bryson v Three Foot Six Limited (No.2)*[1] where the Supreme Court said, amongst other things, that:

> *"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 the 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 require the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) which were important determinants of the relationship at common law…*

[18] In other words I am required to consider the following in order to determine the nature of the relationship:

(a) The intention of the parties;

(b) Was there anything in writing to indicate the terms of the relationship between the parties;

(c) How the relationship operated in practice and this includes, as an essential element, issues of control and integration; and

(d) Whether the applicant(s) were effectively working on their own account.

[19] While not consistent with the above order I consider the first issue to address is that of how the business operated in practise.

[20] It was Ms Morrison's evidence that when she and her husband operated the hotel for the original owner it was joint effort with Mr Morrison doing the bulk of the work relating to their bar business while she attended to staffing issues and paper work. She gave evidence that the hotel operation was effectively ancillary. Patrons and prospective patrons came into the

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[1] *Bryson v Three Foot Six Limited (No.2)* [2005] ERNZ 372 at [32]

bar to make enquiries and pay. The Morrison's then retained a percentage of the takings, in cash, before passing the residue to the owner who covered all expenses and saw to operational issues.

[21] In other words the evidence shows the Morrison's bar business, VCM Limited, was providing a service to the hotel in what was effectively a subcontracting arrangement with both principals of VCM, Ms and Mr Morrison, sharing the proceeds equally irrespective of input or effort. There was no indication Ms Morrison was an employee of the hotel and she does not suggest that was the case. Nor is there any suggestion the hotel's owner exercised any control or there were any issues of integration. At this stage both Morrisons were clearly operating on their own account and that is what the parties intended.

[22] The question then becomes whether or not that changed once C&C was formed.

[23] When asked about that Ms Morrison gave a couple of contradictory answers. Indeed one was that there was to be no change to the way the hotel business either operated or was administered.

[24] Another was that she had become an employee of C&C on a salary of $30,000 while a third was that payment by way of a percentage of the take cease had been replaced by a payment of $30,000 in additional to her share of any revenue distributed to the shareholders.

[25] It is here the evidence of the accountant becomes important. He was adamant the intention, as communicated to him, was that Ms Morrison be employed to manage the hotel and was to be remunerated "over and above her share of the profits".

[26] That said he qualified that statement by advising there was a conflict concerning the remuneration Ms Morrison would receive and the arrangement was never finalised with this being reflected in the first set of accounts he prepared for the 2019/2020 year. They provided for no distribution of profit but did record the payment of "Owners remuneration" to C & V Morrison. In other words the earlier arrangement whereby payment was made to the principals of VCM Limited, which remained in existence at that time, continued as one of Ms Morrison's answers had stated was intended (paragraph [24] above). Mr Ong and Ms Tan received nothing.

[27] The accountant did not finalise those accounts, given the issues between the shareholders gave rise to a conflict of interest forcing his withdrawal, but the final accounts prepared by Mr Smoker reflected the provisions he described. The following years' accounts did likewise and recorded shareholders earnings for C & V Morrison though, again, Mr Ong and Ms Tan received nothing.

[28] When I combine evidence which clearly states that while it was intended Ms Morrison be employed the arrangement was never finalised, the uncertainty in her answers and the fact they included one that reflected what actually happened, I have to concluded intent was not reflected in subsequent actions. She did not become an employee by either agreement or anything that confirmed the intent.

[29] There is also no evidence, or even claim, of any changes in relation to control and integration. Things simply continued to operate as they had previously when the Morrisons were working on their own account. Nothing changed as a consequence of the shareholder dispute.

[30] Turning now to written evidence of the arrangement. As already said the accounts show that contrary to the intent that Ms Morrison become an employee she and her husband continued to be remunerated as they had when providing services to the hotel as principals of VCM Limited. Furthermore the two were not differentiated which strongly mitigates against a conclusion one had become an employee.

[31] To that I add the fact there was no written employment agreement and nor did C&C register itself as an employer with the Inland Revenue. Neither did it deduct PAYE for Ms Morrison – indeed there was considerable evidence about her earnings and the resulting tax payments but it is clear those that were made related to another engagement and were nothing to do with earnings emanating from C&C.

[32] Finally there is the Memorandum of Understanding under which C&C was incorporated. There is nothing therein which supports Ms Morrison's claim she became an employee though there is evidence of the financial commitments the parties made and which the evidence before me suggests might be the real cause of the tensions now between them.

[33] In summary it is clear that when initially operating the hotel Ms Morrison was doing so as a principal of VCM Limited which provided its services as a contractor.

[34] Despite intentions to the contrary the evidence is that under C&C the business continued as before and an employment relationship was never entered into. Ms Morrison caries the burden of proof and for these reasons I therefore conclude she has failed to discharge it and establish she was an employee of C&C. Accordingly her claims fail as the Authority lacks jurisdiction to consider them.

### Conclusion and Orders

[35] For the above reasons I conclude Ms Morrison was not an employee of C&C and the Authority does not have jurisdiction to consider her claims.. They therefore fail.

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but here I note the absence of input that would normally be expected and covered by the tariff such as witness statements from the employer. In such circumstances there would appear a strong argument the tariff be reduced. That along with factors such as this being an equitable jurisdiction and the fact that had Ms Morrison been an employee she would undoubtedly have succeeded leads me to a tentative view costs should lie where they fall.

[37] Should either party disagree it should lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date the other party will then have 14 days to lodge a reply memorandum.[2]

**Michael Loftus**
**Member of the Employment Relations Authority**

[2] www.era.govt.nz/assets/Uploads/practice-note-2.pdf