IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 19
ARC 62/14

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
BETWEEN	MARION HELENA ATKINSON Plaintiff
AND	PHOENIX COMMERCIAL CLEANERS LIMITED Defendant

Hearing: 4 February 2015
(Heard at Rotorua)

Appearances: M Beech and D Prasad, counsel for plaintiff
D Hall, counsel for defendant

Judgment: 24 February 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

Introduction

[1] In this challenge to a determination of the Employment Relations Authority,[1] Marion Atkinson claims that she was dismissed constructively and unjustifiably by the defendant (Phoenix) and seeks appropriate remedies for that wrong.

[2] The important preliminary consideration for the Court is, however, whether Mrs Atkinson was an employee of Phoenix at the time she ceased to work for or with it. Unless Mrs Atkinson was an employee, as defined by s 6 of the Employment Relations Act 2000 (the Act), she cannot bring a personal grievance claim of unjustified dismissal.

[1] *Atkinson v Phoenix Commercial Cleaners Ltd* [2013] NZERA Auckland 569.

[3] The Authority considered that Mrs Atkinson bore the responsibility for establishing the existence of an employment relationship following the defendant's challenge to jurisdiction. It concluded that the plaintiff had not persuaded it that she was more probably an employee than not.

General background

[4] The defendant is a private limited company owned and operated by Shayne Thomson. Mr Thomson has a long background in commercial cleaning, having previously been a franchisee of a major commercial cleaning brand. He established Phoenix to be a local Rotorua business which would reflect his personal experience and commitment to local customers. Whilst Mr Thomson himself could and did undertake cleaning work as and when necessary, his role in the business was to obtain, price and supervise commercial cleaning contracts, and to ensure that the work performed by Phoenix's cleaners was completed to the appropriate contractual standards. Mr Thomson was also responsible for the purchasing and distribution to Phoenix's cleaners of cleaning equipment and consumable products.

[5] At the times relevant to this case, Phoenix had about three or four teams, each consisting of two cleaners, which had jobs allocated to them. When new cleaning contracts were arranged, Mr Thomson offered the work to Phoenix's teams. The teams (and their members) were not obliged to accept such additional work and, I infer, indicated their willingness to take on additional work if they were able and wished to do so. I infer, also, that the retirement or resignation from time to time of members of those teams, and an expanding customer base, meant that Phoenix was sometimes on the lookout for new staff for whom it advertised in the local newspaper. Mrs Atkinson answered one such advertisement in 2009 and began work for Phoenix.

[6] Mr Thomson and Phoenix did not wish to have its cleaners, such as Mrs Atkinson, as its employees. Mrs Atkinson, who had worked as a commercial cleaner for a number of other entities before being engaged by Phoenix, and who indeed may have done so between several engagements by Phoenix in the period from 2009 to

2012, wished at all times to be an employee of Phoenix as she had been of other cleaning companies or other entities previously.

[7] At least in 2012 (and there was no suggestion that this was unusual), Mrs Atkinson was working what, by a conventional analysis, could be called full-time hours. So, too, was the other member of her cleaning team, at times her son Arana. Working about 92 hours per fortnight, largely between the hours of 5 pm and about 7 am on the following day, even at the relatively modest rate of $15 per hour, provided Mrs Atkinson with a gross income equivalent to an annual figure of between about $33,000 and $35,000, depending on whether she took holidays.

The legal test for employment

[8] This is set out in s 6 of the Act which provides materially:

> **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;
> …
> (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.
> …

[9] Section 6 requires the Court to consider, broadly and realistically rather than narrowly and artificially or legalistically, the real nature of the commercial relationship between the parties. It was certainly possible, in law and in practice, for Mrs Atkinson to have been either an employee of Phoenix or an independent contractor to it in business on her own account. Mrs Atkinson's work was Phoenix's core business; that is general cleaning of commercial premises. She was not a cleaner with specialist skills engaged to undertake a particular type of cleaning for which such specialist skills or experience may have been desirable or even necessary.

Relevant case law

[10] In addition to the leading New Zealand case known as *Bryson*,[2] there is now a significant judgment of the Supreme Court of the United Kingdom[3] that I will also consider in this judgment. *Bryson* is the only case under s 6 that has been considered by the Supreme Court or indeed the Court of Appeal in this country. Analysis of the Supreme Court's judgment reveals that it focuses significantly on the role of the Court of Appeal in employment proceedings as well as establishing, in more than general terms, the interpretation and application of s 6. Because the judgment of the Supreme Court overturned the Court of Appeal's (majority) judgment and its reasoning, and restored expressly those of the Employment Court, the judgment of her Honour Judge Shaw in this Court[4] in the *Bryson* case establishes comprehensively the interpretation and application in practice of the section as approved by the Supreme Court.

[11] The Supreme Court reiterated that to determine the real nature of the relationship between parties pursuant to s 6, "all relevant matters" will include the common law tests or guidelines including control, integration, and whether the contracted person has been effectively been working on his or her own account (known as the fundamental test). These three customary indicia are not to be applied exclusively and their conclusions are not determinative of the nature of the relationship.[5] They are conventional and convenient means of establishing, under s 6, the real nature, in practice, of that relationship and whether, in particular, it was one between an employer and an employee.

[12] This is the first opportunity of which I am aware that the judgment of the Supreme Court in the United Kingdom in *Autoclenz* has been considered in New Zealand, at least by the Employment Court.

[13] The *Autoclenz* judgment is not of binding authority and the statutory provisions pertaining to essentially the same question in each country, are not

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[2] *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC); *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA); *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] ERNZ 372.
[3] *Autoclenz v Belcher* [2011] UKSC 41, [2011] ICR 1157.
[4] *Bryson v T here Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC).
[5] *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34 at [32].

identical and arise in different contexts. Nevertheless, the UK Supreme Court's analysis of employment status draws on the largely common legal history in both jurisdictions. It reaches the same broad conclusion as s 6 does in New Zealand requires, that courts must make a realistic assessment of the reality in all the circumstances of work performed in a working relationship upon which significant rights and obligations will depend.

[14] An important feature of both the *Autoclenz* case and *Bryson*, but which is absent in the present case, is that there was a clear written agreement between the parties purporting both to evidence their intention that their relationship was to be one of independent subcontract and, equally expressly, recording the fact that it was not an employment relationship. So, as in *Bryson*, the focus in *Autoclenz* was primarily on whether the Court could determine that the legal status of the relationship was otherwise than that which the parties had recorded expressly and clearly in writing.[6]

[15] Coincidentally, the "workers" in the *Autoclenz* case were valeters[7], what used to be known as car cleaners and groomers. The question was whether they were "workers" under the National Minimum Wage Regulations 1999 (UK) and the Working Time Regulations 1998 (UK) and so entitled to be paid in accordance with the statutory minimum wage and to receive statutory paid leave. The definition of "worker" under both UK legislative instruments was:

> … an individual who has entered into or works under …
>
> (a) a contract of employment; or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

[6] *Autoclenz v Belcher*, above n 3, at [17].

[7] Not a word known to the Shorter Oxford English Dictionary, but perhaps a variant of "valet", defined in the dictionary as "A man-servant performing duties chiefly relating to the person of his master; a gentleman's personal attendant" or "A footman acting as attendant or servant to a horseman." (6th ed, Oxford University Press, Oxford, 2007).

[16] The relevant factual circumstances in *Autoclenz* include the following. The terms of the written contracts of the valeters included that they were subcontractors and not employees; they were obliged to provide their own materials; there were no mutual obligations for the provision of work or service; and they could provide suitable qualified substitutes to carry out their work.

[17] Autoclenz's advertisements had asked for "self-employed people" for well-paid full-time work, and there was a relatively low turnover of staff. Other work requirements were that vehicles had to be cleaned according to detailed specifications; the valeters worked in teams of four; rendered weekly invoices, the contents of which were calculated and prepared by Autoclenz; and that the valeters took responsibility for the payment of tax and national insurance; Autoclenz provided all cleaning materials but charged the valeters for these calculated as a percentage; and the valeters wore Autoclenz branded overalls.

[18] The (UK) Supreme Court accepted that a different approach to contract formation is warranted in employment situations and followed previous cases where courts had held the appropriate test of determining employment focused on the reality of the situation, even where written documentation may not have reflected that reality. Put another way, the Supreme Court said that the question for determination must be the nature of the true agreement between the parties, determined by looking at the reality of the obligations, not merely at the inception of the contract but at any later stage. The Supreme Court accepted that frequently the provider of work is in a position to dictate the terms which the other party performing the work has to accept so that the relative bargaining powers of the parties should be taken into account in appropriate cases. The Supreme Court concluded: "… the true agreement will often have to be gleaned from all the circumstances of the case, of which the written contract is only a part."[8]

[19] In the *Autoclenz* case, the Supreme Court affirmed that the claimants were employees because they had no control over the way in which they performed their work; they had no real control over the hours they worked except that they could leave when their share of the work was completed; they had no real economic

[8] *Autoclenz v Belcher*, above n 3 at [35].

interest in the way the work was organised; they could not source materials themselves; they were subject to the direction and control of Autoclenz management when on site; they worked in teams and not as individuals; they had no say in the terms on which they performed the work; the contracts had been devised entirely by Autoclenz including financial elements; deductions made by Autoclenz did not bear any relationship to real costs; and rates of pay were determined unilaterally by Autoclenz including increasing or reducing those.[9]

[20] The Supreme Court concluded that the valeters were fully integrated into Autoclenz's business. Accordingly, the Court found that the mutual obligations between the parties were the provision of work in return for money so that the contracts were of employment. Although decided otherwise than applying a specific s 6 (NZ) type test, the judgment in *Autoclenz* affirms a very similar approach to the same essential question in the UK as is faced in New Zealand in applying s 6.

Phoenix's case opposing the challenge

[21] If, as the defendant asserts, Mrs Atkinson was not employed by Phoenix, what was the legal nature of their contractual relationship under which Mrs Atkinson cleaned commercial premises in Rotorua? The defendant's case is that Mrs Atkinson was self-employed as an independent contractor to Phoenix, so that her commercial relationship with the businesses whose premises she cleaned was as a subcontractor to their primary contractor, Phoenix. This, in turn, connotes that Mrs Atkinson was in business on her own account as a commercial cleaner.

A (signed) confidentiality covenant

[22] As in the case of all cleaners seeking work with Phoenix, the plaintiff was required to sign a "Non-Disclosure Confidentiality Agreement" even before being interviewed for the first time for a cleaning position. This reflected Phoenix's high level of concern about the potential for disclosure of its confidential information to others, or the other misuse of that confidential information by those seeking to work

[9] *Autoclenz v Belcher*, above n 3, at [37].

for it, or indeed engaged by it if they were. No potential cleaner could ever have got further in the engagement process without signing the confidentiality agreement as the plaintiff did. It was in these circumstances that Mrs Atkinson had no choice but to, and did so, on 7 October 2009, even before she entered into whatever legal relationship she did with Phoenix.

[23] The plaintiff's description in that document as a "Sub Contractor" is not determinative of her legal status and is indeed not an influential factor in that determination. It is the sort of covenant that could equally appear in an employment agreement. The confidentiality agreement may, on one interpretation, have outlived the duration of any commercial arrangement between the plaintiff and the defendant, whether that was one of employment or otherwise. Its final paragraph provided: "The term of this Agreement shall be three (3) years from its execution date and all restriction and obligations cited herein shall expire after such termination. …".

The defendant's (unsigned) independent subcontractor agreement

[24] Although, upon her commencement of work for Phoenix, Mr Thomson had presented Mrs Atkinson with a draft form of subcontractor agreement, she declined to sign this and the issue was not pursued by Mr Thomson beyond repeating his request that she sign it. It was a draft document which contemplated that it would bind the parties to it upon signing. That did not occur.

[25] Although this form of agreement was not signed or otherwise agreed to by Mrs Atkinson, the defendant nevertheless says that its provisions governed the parties' relationship. Even if that was so (which I do not accept), its terms and conditions were at variance in some significant respects with the manner in which Mrs Atkinson's work was performed by her and at least acquiesced in if not agreed to by Phoenix.

[26] Clause 4 of the defendant's generic form of agreement provided as follows:

> The Subcontractor's days and hours of performing such services are variable from day to day and week to week and are mutually determined and agreed upon based upon the requirements and needs of the clients and the availability of the Subcontractor to render such services;

[27] In reality, I find that Mrs Atkinson's fortnightly work varied little from day to day. She had, and Phoenix had good reason also to wish her to have, a largely fixed schedule of sites at which she performed cleaning services. The times at which these cleaning services could be performed (or, perhaps more correctly, could not be performed) were dictated by those customers' operational requirements and were fixed. It was only within a prescribed band of time that the plaintiff could choose when to perform a particular cleaning operation but in practice this did not vary "from day to day and week to week". The plaintiff largely followed a routine of travelling from one site to another probably dictated, as much as anything, by geographic proximity and convenience.

[28] Clause 11 provided:

> The Subcontractor shall not provide the clients of the Contractor with the Subcontractor's home telephone number or any other information including cell phone number and email addresses, enabling such clients to contact the Subcontractor other than through the Contractor.

[29] In practice, Mrs Atkinson did provide her cell phone number to customers for the purpose of enabling them to get in touch with her directly if they could not contact Phoenix's Mr Thomson.

[30] Clause 12 provided: "Payments to the Subcontractor are made on the second business day after the 20th of the month and on or before the 7th of the month".

[31] Phoenix cleaners were paid fortnightly to enable them to operate household budgets more easily than by monthly receipt of income on variable dates. The fortnightly receipt of income is also more consistent with employment than was the agreement's provision for monthly payments.

The work in practice

[32] Assuming that the sample documentation supplied to the Court was indicative of the manner of performance by Mrs Atkinson of her duties, I find they were as follows. Beginning at about 5 pm daily (or perhaps earlier on weekends), the plaintiff cleaned at between two and 11 different customers' premises around

Rotorua. In late February/early March 2012 the plaintiff was responsible for the cleaning of 16 different customers' premises including a sports club, a real estate agent's premises, an optometrist's business, a pub, a surgery, and various commercial offices. The plaintiff worked on 13 days out of 14 in the period between 23 February and 7 March 2012. The shortest daily working periods were a Saturday and Sunday when the plaintiff worked 2.25 hours in each day. The longest day's work was on a Thursday/Friday when she worked for 12 hours.

[33] Phoenix allocated each cleaning location a notional required time, calculated in quarter-hour lots. Mrs Atkinson's shortest allocated time was 45 minutes and the longest timeslots were 1.5 hours. Over that fortnight the plaintiff was recorded as having worked 92.5 hours. The hours worked appear not to take account of travelling times between jobs but there was no evidence whether this was so and what such travelling times were in practice.

[34] There was a degree of flexibility allowed to the plaintiff as to when some, and perhaps even most, customers' cleaning needs could be completed. In general this flexibility permitted Mrs Atkinson to choose when any particular premises were cleaned between the time of its closure on a working day and the time of its reopening on the next working day.

[35] What is known traditionally as 'job and finish' was permitted. An experienced cleaning team could often complete a customer's cleaning in less time than was allocated notionally by Phoenix; nevertheless, the cleaners could claim payment for the notional allocated time. I infer that Phoenix's customers were charged on a set and unvarying basis of the notional allocated time.

[36] Cleaning was undertaken in teams of two persons, enabling health and safety requirements to be met on premises that were secured and otherwise devoid of people. It was important for Phoenix that, whenever possible, the same cleaning team (or at least one of them) worked in a client's premises on each occasion, although allowances had to be made for illness and other unavailability, in which case another cleaner, or sometimes Phoenix's Mr Thomson himself, would substitute for an absent cleaner. Phoenix did not permit its cleaners to pick and choose which

premises they regularly cleaned or whether they would do so on any particular day. To have done so would have been both impracticable, and unacceptable to Phoenix.

Advertisements

[37] Phoenix advertised regularly in the local newspaper for cleaners. That is how Mrs Atkinson first found work with Phoenix in 2009. Its advertisements followed the same general format although with variations from time to time:

CLEANERS
Full time position
required for a
Premium Cleaning
Company
Above the award
wage for the right
person
Must have clean full
drivers licence

Please send CV and
covering letter to
[email address]
[cellphone number]

[38] Some of the advertisements referred to a requirement for a "Security clearance" in addition to the driver's licence, and some omitted reference to "Above the award wage". Such advertisements as referred to an "Above the award wage" tend, in several respects, to indicate a relationship of employment. Although awards which were long a feature of employment and industrial relations in New Zealand have not been in effect since the early 1990s, Mr Thomson claimed that the reference was to the concept of a 'going rate' for the job.

[39] Reference to the word "wage" also connotes employment. I infer that the requirement for a "full" driver's licence contemplated the necessity to drive between cleaning sites in the early hours of the morning. Quite what a "clean" driver's licence meant, or the purpose of this requirement, was not clear. It is significant, however, that there was no reference to a requirement for the cleaner to provide his or her own motor vehicle for the performance of the work.

[40] None of the advertisements referred to contractors being engaged in business on their own account or any of the other similar phrases that are often seen when contractors or subcontractors (as opposed to employees) are sought.

Tools and equipment

[41] It is common ground that Phoenix provided these for Mrs Atkinson's use. They included vacuum cleaners, rags, chemicals, and all other plant and consumables used in commercial cleaning. Phoenix's case is that it did so to ensure consistency of standards and for health and safety reasons.

Uniform

[42] Phoenix provided Mrs Atkinson with a branded tee-shirt which she was required to wear whilst undertaking cleaning duties. The brand was Phoenix's and the tee-shirt identified Mrs Atkinson as being a Phoenix cleaner whilst on customers' premises. Phoenix says that it required cleaners to wear this uniform to ensure a consistent standard of personal appearance and presentation, and for easy identification of Mrs Atkinson for security reasons when she was on customers' premises.

Motor vehicle

[43] At times Mrs Atkinson was provided with a sign-written Phoenix-owned van to transport herself and materials to and from her home and between cleaning sites. The sign-writing clearly identified the van as being Phoenix's. Phoenix paid for all costs associated with this vehicle and although, from time to time, Mrs Atkinson was permitted to take the vehicle home, she was not allowed to drive it for any other personal use. At other times, she used a car that she herself provided, to travel between her home and work and between cleaning sites.

Industry practice

[44] From the very limited evidence furnished in relation to other similar commercial cleaning businesses in a nearby provincial city, I conclude that commercial cleaning, such as is undertaken by Phoenix and as was performed by the plaintiff, can be and is undertaken by employees and independent contractors. Although not in this case, there are also at least two variations on that theme. Commercial cleaning can be and is performed by employees of franchisees of a franchised cleaning brand such as Crest Commercial Cleaning and others. The other industry scenario is that there can be and are cleaning contractors such as Phoenix who engage subcontractors who, in turn, employ individual cleaners.

[45] The "industry practice" factor is neutral in the determination of this case.

Financial and tax arrangements

[46] Phoenix deducted "Withholding Tax" at a set rate (apparently 20 per cent from the documentary exhibits produced) and irrespective of the plaintiff's own tax code but, except for that deduction, paid to her the net balance of the remuneration earned by Mrs Atkinson. Although the manner in which the defendant dealt with tax on Mrs Atkinson's remuneration may appear to be indicative of her status in employment law, two considerations affect that significantly. First, this is a decision under s 6 of the Act which determines whether someone was or was not an employee for the purpose of that person's access to employment law's statutory protections. I imagine that a decision under s 6 of the Act is not determinative of tax status, just as tax status cannot determine the outcome of a s 6 enquiry.

[47] The second important caveat, when assessing the relevance of tax payments in a s 6 application, is that it is the "employer", generally, who or which makes the decision to deduct withholding tax based on that party's assessment of the nature of the relationship. It is, therefore, in the nature of a subjective and potentially self-serving decision and cannot, in these circumstances, be held up as an influential factor in an objective assessment of the real nature of the working relationship under s 6.

[48] In true and uncontroversial circumstances of employment, most taxation arrangements will follow the PAYE model. In true and obvious independent contractor circumstances, deduction of withholding tax, or payment of an invoice without deduction, will occur. In the less distinct middle ground as illustrated by this case, one party's unilateral determination of the taxation arrangements adopted will not be determinative of or persuasive about s 6 status. That is especially, as here, where I am satisfied that there is no sophisticated appreciation of the implications of those taxation arrangements by the other party who has not been involved in implementing them. Nevertheless, the issue having been relied on by the defendant, I will address it.

[49] After the plaintiff completed her fortnightly spreadsheet of work undertaken, which included details of the defendant's customers for whom the work had been performed and the notional times allocated for that cleaning work, this raw information was collected by the defendant's Mr Thomson. It was processed by the defendant's chartered accountants' payroll software program to calculate a gross remuneration figure consisting of the number of notional hours worked over the fortnight multiplied by an hourly rate of $15. The software program then deducted what was referred to as PAYE but appears to have been intended by the defendant to have been "withholding tax" at what I infer was a fixed rate of 20 per cent rate which, unlike PAYE, was not determined by the individual taxpayer's tax code. The net balance was then paid (fortnightly) into the plaintiff's nominated bank account.

[50] Similar arrangements for the deduction of tax appear to have been made by the defendant in respect of some other cleaners engaged by it, although others again appear to have rendered invoices (whether GST inclusive or exclusive is unclear) to Phoenix and were paid the gross amount of these invoices, leaving them to make their own taxation arrangements with the Inland Revenue Department.

[51] In this case, there was no more than the most scant evidence going to this level of detail about any of the withholding tax deductions made by Phoenix from Mrs Atkinson's remuneration.

[52] There is no evidence as to how the plaintiff dealt with her personal tax returns or, indeed, if she completed any of these. I mention that as a possibility because Mrs Atkinson did receive a demand for substantial income tax and accident compensation levy arrears from the Inland Revenue Department in 2012, based on its assessment of her income at the time she was working for Phoenix.

[53] Mrs Atkinson did not have an accountant, was not registered for GST, and appears not to have sought to deduct any work-related expenses of a commercial cleaning business from her gross income as she may have been entitled to do had she not been an employee of Phoenix.

[54] As I have already noted, from the outset of its commercial relationship with Mrs Atkinson, Phoenix wished her not to be its employee. The taxation arrangements (described above) which it put in place unilaterally, reflected that intention. I infer that, as someone unsophisticated in the ways of small businesses and their taxation arrangements, the plaintiff simply went along with receiving the net fortnightly sum deposited in her bank account as described above. That was perhaps even without any consideration as to whether she could adjust the amounts of tax paid on her behalf by Phoenix or whether any additional tax had to be paid by her at the end of each taxation year.

[55] In these circumstances, the taxation arrangements relating to the plaintiff's remuneration may, on one view, tend to indicate the absence of an employment relationship between the parties but, in their context as described above, are neutral and uninfluential in determining the s 6 question in this case.

An absence of common intention?

[56] Although determining the existence of an employment relationship has often been said to be an exercise in determining what was, in reality, the parties' common intention, in this case the evidence is that there was no common intention about the nature of their working relationship. There was, nevertheless, a common intention that the plaintiff would perform cleaning work for the defendant. From the outset, Mr Thomson of Phoenix wanted Mrs Atkinson to be a subcontractor to Phoenix and

to agree to that status by signing Phoenix's standard form of "Subcontractor Agreement", a template of which was produced in evidence. From the outset, also, Mrs Atkinson wished to be an employee of Phoenix and not a subcontractor to it. She evinced that intention by declining to sign Phoenix's form of subcontractor agreement and asking to be treated as an employee. Despite this now apparently fundamental disagreement between the parties about the nature of their commercial relationship, Mrs Atkinson nevertheless began and continued cleaning work for Phoenix for a period of some three years, albeit intermittently. Mr Thomson did not press the issue of getting Mrs Atkinson's agreement to his subcontractor agreement by signing the same. Mrs Atkinson likewise did not pursue, other than in a desultory way, her requests of Mr Thomson for an employment agreement.

[57] In my assessment, both Mr Thomson and Mrs Atkinson realised almost from the outset that neither would change his or her position on that legal status issue. However, Mrs Atkinson wanted to work as a cleaner for Phoenix and Mr Thomson considered her a sufficiently good cleaner that he did not wish to lose her if that could be helped. In these circumstances, both parties developed and continued an undocumented commercial relationship, perhaps in the expectation or hope that this unresolved question would not have to be determined in this forum.

[58] Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purpose of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee.

The control test

[59] I now move to the first of the still-applicable common law tests, each of which is relevant in deciding the case under s 6.[10] This guideline requires a determination of the nature and extent of control of the work performed and with

[10] The principles are laid out in *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [19]; and affirmed in *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34 at [5], [32].

whom such control rested. The application of this test favours a conclusion that this was an employment relationship rather than one of independent subcontractor. That is for the following reasons.

[60] Cleaning contracts were obtained and negotiated by Phoenix's Mr Thomson. There was a degree of flexibility about the times at which Mrs Atkinson could undertake her cleaning work, albeit that this was required to be outside normal business hours to avoid customer disruption. Phoenix prepared, and required Mrs Atkinson to adhere to, a schedule of areas to be cleaned, and how to clean them, at particular customers' premises. If there was a complaint by a customer about the standard of the cleaning, this was made to, and investigated by, Mr Thomson of Phoenix, and any rectification or improvement was the subject of direction by him.

[61] Although Phoenix cleaners (including the plaintiff) were able to agree to take on additional cleaning work offered by Phoenix when new cleaning contracts were obtained by it, how and broadly when such work was done by the cleaning teams (including the plaintiff's) was dictated by Phoenix. So, for example, the cleaning of commercial offices had to take place outside a business's usual hours of operation although there was a degree of flexibility within those broad parameters. Adequacy of the cleaning work performed by the plaintiff was assessed by Phoenix. For the plaintiff at least, if she was unable to undertake cleaning duties on a particular day, the plaintiff contacted Phoenix which arranged for a temporary replacement of her.

[62] The plaintiff was obliged to wear a Phoenix branded uniform when undertaking her work and, to the extent that cleaning equipment was provided to the plaintiff by Phoenix, she was required to perform the cleaning work in the manner dictated by that equipment.

The fundamental test[11]

[63] This second test is a shorthand description for the guideline, developed at common law, as to whether Mrs Atkinson engaged herself to perform the cleaning

[11] At [10], citing *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184; [1968] 3 All ER 732 at 737, per Cooke J.

services with Phoenix as a person in business on her own account. I have concluded, for the following reasons, that the application of this test or guideline favours Mrs Atkinson's position of employment, rather than Phoenix's of engagement as an independent contractor.

[64] Mrs Atkinson had no independent trading entity such as a company or partnership. She was not GST registered as she could have been if operating as a trading entity, including as a sole trader, and she did not have an accountant who dealt with her financial affairs. Mrs Atkinson did not purchase or otherwise have any tools of trade or even consumables used in commercial cleaning. Whilst she had a mobile phone, I infer that this was a personal one and not a business phone. Accepting, as I do, that for a significant amount of the time that she was working for Phoenix Mrs Atkinson used a motor vehicle supplied by the defendant, this was a van owned by, and the operating costs of which were met by, Phoenix. It exhibited Phoenix sign-writing and she was not permitted to use it for personal purposes. To the extent that Mrs Atkinson may have used a motor vehicle to travel between her home and the sites at which she cleaned, and between those sites, this was her own or someone else's private motor vehicle, the operating costs of which she met out of her income from Phoenix. The only documentation that Mrs Atkinson undertook or completed in relation to her cleaning work was a fortnightly timesheet which set out the names of the customers of Phoenix whose premises she cleaned, the notional number of hours allowed for cleaning those premises on a daily basis, and the total of these figures to give an overall number of hours worked by her for the particular fortnight. All processing of that information was, thereafter, taken by Phoenix and her remuneration calculated from it was deposited by the company into Mrs Atkinson's bank account.

[65] Mrs Atkinson's income was not determined or even affected substantially by the profits or losses made by Phoenix. Her only ability to increase her remuneration, other than by negotiating an increased hourly rate with Phoenix, would have been to have offered to take on additional cleaning work if and when that was made available to her and other cleaners. Given the number of hours that she was working and the times at which she performed the cleaning work, and the inability for this work to be undertaken when customers' premises were open for business, Mrs

Atkinson had little, if any, real ability to increase her economic fortunes whilst engaged by Phoenix.

The integration test

[66] This third common law guideline determines the extent to which the plaintiff was integrated into the defendant's business. Its application in any case is dependent, in substantial part, on the nature of the business and the work performed. So, for example, whilst in other cases the allocation of an office, an employer's email address, the provision of a business mobile phone, business cards, and the like have been important elements in determining this test, the nature of commercial cleaning eliminates most, if not all, of those considerations. The plaintiff began work each day (or evening) by simply turning up with the appropriate equipment at the first of the premises to be cleaned. She then moved between those premises and returned home at the end of her work. Having an office or its other accoutrements for its commercial cleaners, whether they were employees or independent contractors, was not a feature of Phoenix's business, and indeed seems an unlikely feature of any commercial cleaner's work.

[67] I have concluded that the plaintiff was more integrated than not into the business of the defendant at the time when their commercial relationship ceased finally. She wore Phoenix uniform clothing and, at least for a not insignificant portion of the time, drove between assignments in a Phoenix sign-written van. Apart from completing her fortnightly timesheet, all 'paper work' to do with the plaintiff's work was undertaken by Phoenix or its chartered accountants. A neutral but interested observer of Mrs Atkinson performing her duties on any evening or over a weekend would identify her as a Phoenix cleaner.

[68] The defendant's case is that the plaintiff's periodic engagement by Phoenix over the period of three years is inconsistent with her being integrated into that company's organisation. I do not agree with defendant's counsel's categorisation of that episodic engagement as "frequent departures and returns at will and without rancour …". The evidence goes only so far as revealing that, during the period 2009-2012 Mrs Atkinson ceased engagement with Phoenix but returned to work

again for it. That is a consideration which is not inimical to employment or even to integration into Phoenix's business. In employment terms, it is more in the nature of (but does not amount to) casual engagements or employments and re-employments and is, in my assessment, not an influential factor pointing away from an employment relationship.

The overall 'reality' (s 6) test

[69] This is the express and broad statutory test to determine this issue under s 6 of the Act. Standing back from all of the detail of the evidence, and of the tests developed at common law and which are still applied, this is a plain case in reality of an employment relationship between these parties. Although all such cases are intensely factual and comparisons between very different isolated cases are usually unhelpful and inappropriate, I have to say that this is a significantly stronger case of an employment relationship than either *Bryson* (in New Zealand) or *Autoclenz* (in the United Kingdom).

A different outcome on the challenge

[70] Whilst the Authority's determination did conclude that the application of the fundamental test indicated the existence of an employment relationship, it decided that the control and integration tests pointed the other way. As to the Authority's findings on the control test, this may have come about as a result of different evidence that was presented to the Court. For example, I do not accept (as the Authority found) that Mrs Atkinson could arrange directly with a customer on which days she worked and for how long. Nor do I accept on the evidence heard by me that she was entitled to elect whether or not she would perform work at any customer's premises on a particular day other than for good reasons (such as illness), in which case Phoenix would arrange a replacement for her. Nor does the evidence tendered to the Court indicate that after a new customer was engaged by Phoenix, a cleaner such as the plaintiff would meet directly with the customer and develop a personal relationship. Rather, I find that customer relationships were with Phoenix and this is illustrated by the defendant's emphasis on protection of its confidential information and preservation of its customer base.

[71] In relation to the integration test, the Authority appears to have minimised the significance of the Phoenix branded uniform clothing that Mrs Atkinson was required to wear whilst working. This was said to have been "to ensure a tidy standard of presentation whilst on a client's premises" and that it was "more a practical factor rather than determinative of Mrs Atkinson's status." I consider that the uniform requirement was for other reasons including promotion of the Phoenix brand, identification of the lawfulness of the cleaner's presence on premises outside normal business hours, and to be a practical manifestation of the personal service that Mr Thomson of Phoenix offered to his customers. The working uniform requirement imposed by Phoenix was an indication of both integration and of an employment relationship.

[72] The Authority also relied on what it says was evidence from Phoenix clients about their beliefs about Mrs Atkinson's status. The admissibility of that evidence was challenged and it was not permitted at the hearing before me. It was not, therefore, a factor relevant to the integration issue, let alone one favouring the defendant's case as the Authority found.

The personal grievance

[73] Having concluded that the plaintiff was the defendant's employee when that relationship ended, it is open to the plaintiff to pursue her personal grievance of unjustified constructive dismissal. As part of the interlocutory preparation to expedite determination of the preliminary status issue, it was agreed that the Court would not decide these subsequent substantive questions of whether Mrs Atkinson was dismissed constructively and, if so, unjustifiably. Scant and otherwise uncorroborated evidence was called in support of, and in rebuttal to, that allegation. Mrs Atkinson bears the onus of establishing that she was constructively dismissed and my preliminary view on the evidence adduced is that hers is a weak case of constructive dismissal, let alone of unjustified dismissal. However, as agreed with counsel, the parties should now have an opportunity to attempt to resolve that matter, in direct discussion between their representatives and/or in mediation. If those questions cannot be resolved in that way, leave is reserved to the plaintiff to ask the

Court to determine those issues on the evidence heard by, and submissions made to, it at the recent hearing.

Result

[74] The Authority's determination finding against the existence of an employment relationship is set aside. At the time when she finished working for Phoenix, Mrs Atkinson was its employee and she is entitled to pursue employment-related entitlements including, in this case, a personal grievance for unjustified constructive dismissal.

Costs

[75] The plaintiff is entitled to costs on the challenge and for her representation in the Authority. That is also a matter on which I invite the parties to attempt to reach a settlement between them; although, if that cannot be done, leave is likewise reserved for either party to apply on reasonable notice for the Court to determine costs.

GL Colgan
Chief Judge

Judgment signed at 9.15 am on Tuesday 24 February 2015