

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2021] NZEmpC 93
EMPC 149/2020**

IN THE MATTER OF an application for a declaration under s 6(5)
 of the Employment Relations Act 2000

BETWEEN JAZMINE GESTRO
 Plaintiff

AND CRAIG PRESTON RELPH
 Defendant

Hearing: 19 March and 20 April 2021
 (Heard at Wellington)

Appearances: P McKenzie-Bridle, counsel for plaintiff
 C Relph in person

Judgment: 28 June 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Ms Jazmine Gestro seeks a declaration under s 6(5) of the Employment Relations Act 2000 that Mr Craig Relph was her employer. This allegation is made for the purposes of an unjustified dismissal grievance she intends to bring.

[2] Ms Gestro worked at a business operating under the name Lodge in the City (the Lodge). She was employed to work there from 18 December 2019 to 23 January 2020, when she was dismissed.

[3] After Ms Gestro commenced her employment, she was presented with an individual employment agreement (IEA) which she signed. It named Lodge in the City Ltd as her employer. That company, however, had been removed from the Companies Register prior to the commencement of her employment.

[4] Ms Gestro says Mr Relph is a former shareholder and director of Lodge in the City Ltd. It is her case that at all relevant times the Lodge was registered in his name. She says that, on the basis of this and other factors, the real employment relationship was between her and Mr Relph.

[5] For his part, Mr Relph strongly denies these allegations. He says the business was at the time of Ms Gestro's employment, operated by LITC Ltd trading as the Lodge. He asserts LITC Ltd acquired the ownership and management structure formerly held by Lodge in the City Ltd. He also acknowledges, however, that a trust of which he is the sole trustee, called the Platinum Property Trust (the Trust), owns both the building and the assets of the Lodge business.

Evidence

[6] In her evidence, Ms Gestro outlined her belief that Mr Relph was in charge of the Lodge and its operations and was her employer.

[7] She then called Ms Megan Stiles who worked for two periods at the Lodge, the second of which was during the time when Ms Gestro worked there.

[8] Ms Stiles said that the General Manager of the Lodge, Mr Sam Arora, interviewed her for her job, but he was not the boss and seemed more like middle management.

[9] She said that she had a reception role which developed into becoming second in charge at times, so that she began to handle financial responsibilities, such as cash handling; monthly financial reports; updating accounts for the business on an online package; dealing with invoicing and refunds; and training new staff, including Ms Gestro.

[10] It was Ms Stiles' opinion that Mr Relph was "a bit like a ghost at the Lodge". She never met him, but it was obvious he was the boss. Mr Arora told her that Mr Relph was the "big dog".

[11] She said that Mr Relph's name was also mentioned in an accounting package which related to the Lodge. Moreover, correspondence addressed to him was delivered to the Lodge.

[12] Ms Stiles also said that several persons attended the Lodge from time to time who she believed did so under the control of, or on behalf of, Mr Relph. A specific example was Mr Karl Davis. He would uplift correspondence addressed to Mr Relph. He would also from time to time, remove cash for banking.

[13] She believed the Lodge was associated with a company which she named as Portfolio Property Management Ltd. She understood it too was operated by Mr Relph. It held meetings from time to time at the Lodge.

[14] Ms Stiles also described a set of keys held at the Lodge's reception. The keys related to various properties managed by the associated entity, Portfolio Property Management Ltd.

[15] Ms Stiles produced a sequence of emails. The first of these was directed to two persons whose email addresses were care of the Trust. The email raised concerns about Mr Arora's management. One of the addressees, Mr Davis, responded. He asked her to outline the issues she would like to discuss about Mr Arora's management, which she did. Mr Davis ultimately said he would meet with Mr Arora and work through the items raised, stating that "we" will provide him with support.

[16] Mr Relph then presented his case. He called Mr Davis who said he was an independent contractor working for the Trust. He stated he was not employed by Mr Relph and did not report to him. He also clarified that a statement he made in the email chain referred to above, to the effect that he was Finance Manager for LITC Ltd, was incorrect.

[17] The gist of his evidence was that Ms Gestro was employed by LITC Ltd because she was paid by this entity.

[18] Mr Davis acknowledged receiving a copy of the proceeding issued by Ms Gestro after it was served at the Lodge, albeit it was addressed to Mr Relph. He said Mr Arora had told him about it and was confused about what to do with it. Mr Davis said that because he “supported” Mr Arora as Manager of the Lodge, it was appropriate for Mr Arora to raise the issue with him. He then emailed counsel for Ms Gestro, Mr McKenzie-Bridle, apparently on behalf of Mr Relph. He asserted Ms Gestro’s employer had been LITC Ltd, not Mr Relph.

[19] In his evidence, Mr Davis was asked about Mr Relph’s role with regard to the premises at 152 Taranaki Street, from which the Lodge business operated. He agreed that if there was a fundamental concern about the adequacy of the building, Mr Relph would need to deal with it.

[20] The next witness called by Mr Relph was Mr Arora. He stated he had managed the Lodge for approximately 10 years. He said he was originally employed by Mr Alvin Relph, then one of the directors of LITC Ltd, and the father of Mr Relph.

[21] Mr Arora said that he was wholly responsible for management of the Lodge. However, if he had any issues with regard to management, he would raise those with Mr Alvin Relph. Mr Arora acknowledged that he had not seen Mr Alvin Relph for a couple of years.

[22] He also said that if he required assistance, he would “occasionally” converse with Mr Davis, who he described as a contractor to the Trust. He confirmed Mr Davis also picked up cash takings from the Lodge business.

[23] It was his view that if anything needed to be done to the building at 152 Taranaki Street, that would be Mr Alvin Relph’s responsibility.

[24] Mr Arora was unclear as to the circumstances relating to the cessation of activities of Lodge in the City Ltd. But he said a mistake had been made in

Ms Gestro's IEA in that the name of Lodge in the City Ltd was used, instead of LITC Ltd. He signed the IEA, nonetheless.

[25] With regard to the financial affairs of the Lodge business, he thought bank statements would probably go to the Trust. None were produced.

[26] Mr Arora agreed that on the basis of his evidence, it looked as if he had "limitless authority".

[27] Asked if he was reluctant to name Mr Relph as being the person behind the Lodge business, he said he was not sure what Mr Relph's position was, or "what's going on under what's name". He said he had never had a chance to discuss these matters with Mr Relph. He denied ever referring to Mr Relph as "top dog".

[28] He also referred to other people who would attend the Lodge for support purposes, including "a guy called Wayne", whom it was later established was Mr Wayne Wilkinson. Mr Arora said Mr Wilkinson worked for Portfolio Property Management Ltd, a company he said was operated by Mr Alvin Relph.

[29] The final witness was Mr Relph. He said his name appeared on the title of the building at 152 Taranaki Street as sole trustee of the Trust. He also confirmed that the Trust owned assets used by the Lodge business at 152 Taranaki Street. He said there is a lease in respect of the Lodge between LITC Ltd and the Trust; such a document was not produced.

[30] Mr Relph said Mr Arora had originally been employed by his father, Mr Alvin Relph, then a Director of Lodge in the City Ltd. He said that some years previously, the assets of Lodge in the City Ltd had been transferred to LITC Ltd, a company of which he was the sole director and shareholder. His father had ceased to be involved in the affairs of the Lodge. Mr Relph said that although he is the sole director and shareholder of LITC Ltd, he had not provided Mr Arora with any authority as to Lodge affairs.

[31] He said Ms Gestro's IEA was erroneous as to the identity of the employer. Also erroneous was a provision that stated she was to be paid a salary; in fact she was employed on a casual basis.

[32] He said LITC Ltd was struggling, and that the Trust to date had loaned that entity some \$700,000. He produced financial records for the Trust of 2018/2019, which did not record such a loan.

[33] He challenged the accuracy of Ms Stiles evidence, particularly regarding her assertion that the Lodge was associated with Portfolio Property Management Ltd. When it was put to him by the Court, he agreed that the reason this entity was not operating at the time of Ms Stiles' employment, was because it had been removed from the Register and its operations had been taken over by Property Management Wellington Ltd.

[34] It is necessary to discuss Mr Relph's evidence on salient points more fully later.

Legal framework

[35] Ms Gestro seeks a declaration under s 6 of the Employment Relations Act 2000.

[36] Although claims under the section often relate to the question of whether an individual is an employee or an independent contractor, it is well established that its provisions can assist when there is an issue as to identity of the employer where there is no dispute the claimant is an employee.¹

[37] The section relevantly states:

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

¹ *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69 at [86] and [98(c)]; *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 112 at [17]; and *Hutton v Provencocadmus Ltd (in Receivership)* [2012] NZEmpC 207, [2012] ERNZ 566 at [78].

...

- (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.

...

[38] In the leading authority on the section, *Bryson v Three Foot Six Ltd*, the Supreme Court held that the Court must consider all relevant matters, which include:²

- a) The written and oral terms of the contract which will usually contain indications of common intention as to status.
- b) Any divergence from or supplementation of those terms and conditions, evident from the way in which the relationship operated in practice; what is important is the way in which the parties have actually behaved in implementing their contract.
- c) The reference to “all relevant matters” also requires consideration of features of control and integration, and whether the contracted person has been effectively working on his or her own account (the fundamental test), all as determined at common law.
- d) But it is not until there has been an examination of 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 real nature of the relationship in light of the control, integration and fundamental tests.

[39] As Judge Perkins observed in *Clark v Northland Hunt Inc*, none of the common law tests individually will necessarily be conclusive, although respective weight will be placed upon them depending upon the overall factual matrix.³ What is important

² *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 (SC) at [32].

³ *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (NZEmpC) at [22].

is an overall impression of the underlying and true or real nature of the relationship between the parties.⁴

[40] An “intensely factual” analysis may be necessary to determine the real nature of the relationship.⁵

[41] Mr McKenzie-Bridle, counsel for Ms Gestro, submitted that the following dicta of the full Court in *Prasad v LSG Sky Chefs New Zealand Ltd* is also of assistance:⁶

In assessing where on the spectrum a case sits the Court will closely scrutinise the way in which arrangements are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practice, to determine what the real nature of the relationship is.

[42] As has also been noted previously, employer-status is an important issue since correctly identifying the employer provides an employee with access to statutory entitlements, including wages and holiday pay, KiwiSaver contribution, personal grievance procedures and other rights such as the right to bargain collectively.⁷

Analysis

Preliminary observations

[43] Mr Relph and his supporting witnesses said that Ms Gestro had been asked to sign an IEA which identified Lodge in the City Ltd as the employer, in error. That company did not exist at the time. It is worth noting that this is not an action for rectification, or one brought under the Contract and Commercial Law Act 2017 on the ground there had been a contractual mistake. The Court cannot, therefore, simply overlook what is said to be an error. Rather, it must determine the real nature of the relationship by taking all relevant matters into consideration, as just discussed.

⁴ *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) at [31] per McGrath J dissenting, this approach being undisturbed on appeal to the Supreme Court.

⁵ *Franix Construction Ltd v Tozer* [2014] NZEmpC 159, [2014] ERNZ 347 at [44]; citing *Singh v Eric James and Associates Ltd* [2010] NZEmpC 1 at [16].

⁶ *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [93].

⁷ *Leota v Parcel Express Ltd* [2020] NZEmpC 61, [2020] ERNZ 164 at [2].

[44] In his evidence, Mr Relph referred to the fact that the Lodge business was struggling for COVID-related reasons, although he was reluctant to agree that it is insolvent. At the same time, he and his witnesses said the real employer was LITC Ltd, and that Ms Gestro should bring her claim against that entity. The inference was that she could take her chances as to enforcement.

[45] As I shall discuss more fully below, there are significant aspects of the evidence given by Mr Relph, Mr Davis and Mr Arora each of which are implausible. For example, Mr Arora was adamant he had nothing to do with Mr Relph, that he was solely responsible for managing the Lodge, and that if he had any problems, he would go to Mr Alvin Relph. His evidence was wholly unreliable because it is plain on the evidence that Mr Alvin Relph ceased to have anything to do with the Lodge some years prior to these events.

[46] Mr Arora was reluctant to concede that Mr Relph was involved in any way with the management of the Lodge. So too were Mr Davis and Mr Relph himself. Mr Relph went so far as to suggest that Mr Arora was solely responsible for managing the Lodge for LITC Ltd, but as that company's director, he had given him no authority to do so. He also said Mr Davis did not report to him, even though his services were contracted to the Trust.

[47] He also suggested that if LITC Ltd was not the employer, Mr Arora, or even Mr Davis was. This rather suggested he was willing to have any person or entity rendered liable, even persons working directly or indirectly for him; so long as it was not him.

[48] I will refer later to particular other examples where Mr Relph has attempted to avoid liability, where it has suited him to do so.

[49] Generally, I find that his case, as articulated by himself and his two witnesses, rested on vague and self-serving statements. In many respects, that evidence was unreliable.

[50] Against that background, I turn to consider the standard factors which apply to a s 6 analysis.

Common intention

[51] As the Supreme Court explained in *Bryson*, the written and oral terms of the contract between parties usually contain indications of their common intention.⁸

[52] In the present case, however, no one is asserting that the employment relationship was in fact with Lodge in the City Ltd, the party named in the IEA.

[53] Mr Arora signed the document apparently on behalf of that entity. However, it was removed from the register of companies on 15 November 2017.

[54] It is also the case that Mr Arora had a confused idea as to the identity of entities involved with the Lodge in any event.

[55] He was vague on the point as to whether LITC Ltd had become the entity which operated the Lodge. He asserted that Mr Alvin Relph, who was neither a shareholder nor director of LITC Ltd, continued to be his boss.

[56] One of Mr Relph's contentions was that LITC Ltd was Ms Gestro's employer because her payslips bore the name of that entity.

[57] There is some doubt as to the status of that entity, despite what Mr Relph said in his evidence about it.

[58] On this topic, Mr McKenzie-Bridle relied on a previous case brought against that company in the Employment Relations Authority: *Higgs v LITC Ltd*.⁹ There, the Authority was required to consider an application for a compliance order, due to failure by LITC Ltd to comply with terms of settlement it had entered into with Ms Higgs.

⁸ *Bryson*, above n 2.

⁹ *Higgs v LITC Ltd* [2014] NZERA Wellington 63.

[59] For the purposes of the compliance action, Mr Relph sent an email to the Authority which stated in part:¹⁰

... There is no point in attending the investigation meeting;

LITC was set up as the employment arm of Lodge in the [C]ity in 2009. The company has no assets or cash flow. Therefore the company LITC [L]td does not have any funds available to settle the debt. We have ceased operating under that company. We suggest [Ms Higgs] or her representative put that company into liquidation.

We continue to operate under a separate company; LODGE IN THE CITY LIMITED (1278856), which has different directors and was set up in 2003.

[60] The Authority held it could not accept Mr Relph's claim that LITC Ltd operated the business, because the register of companies indicated it was in the process of being removed from the register. Although LITC Ltd was apparently not subsequently removed from the register, Mr Relph's email was in all probability an attempt to avoid liability.

[61] On the evidence I am unable to accept Mr McKenzie-Bridle's submission that LITC Ltd should be regarded as ceasing to operate at the time of the determination in 2014.

[62] Mr Relph produced current accounting records relating to this company. Mr Arora, as Manager of the Lodge, was able to log into this material in late March 2021.

[63] There is thus some evidence that there was as at that date a financial association between the operation of the Lodge and LITC Ltd, which is still on the register.

[64] Ms Stiles said her wages were paid by this entity.

[65] Although no financial reports or bank statements were produced for LITC Ltd, I do not rule out the possibility that LITC Ltd was used to pay Ms Gestro's wages.

¹⁰ At [6].

[66] That fact, however, does not support a proposition that there was a common intention between the parties that LITC Ltd would become Ms Gestro's employer. There is no evidence she was told at the time of her employment a mistake had been made and asked if she could agree LITC Ltd would be her employer.

Control test

[67] Mr McKenzie-Bridle submitted Mr Relph personally controlled the business affairs of the Lodge.

[68] Because this proposition is roundly disputed not only by Mr Relph, but also his witnesses, it is first necessary to review the evidence relating to the way Mr Relph operated his business interests generally. Then I will consider the position with regard to the Lodge.

[69] Evidence was given as to a substantial network of companies, many of which Mr Relph was the sole director and shareholder, some 27 in number.

[70] Questioned closely about these, Mr Relph said that not all of the entities shown on the Companies Register where he was described as a director and/or shareholder were active. He said there were "five" or "eight" active businesses.

[71] Mr Relph is settlor of the Trust, sole trustee, and at one stage, but possibly no longer, a primary beneficiary. Various members of his family are primary and secondary beneficiaries. He says that, with regard to some of the companies, including LITC Ltd, his involvement as director and/or shareholder is not personal, but as trustee of the Trust.

[72] A further relevant fact is that according to redacted financial statements which record the position for 2018 and 2019, the Trust owns a significant number of properties, including 152 Taranaki Street.

[73] It is also apparent that assets and business operations are transferred from one entity to another, as may be desired. One example given by Mr Relph related to the

winding up of Portfolio Property Management Ltd because it was in debt, with its activities being taken over by Property Management Wellington Ltd.

[74] Another example of willingness to alter relevant structures occurred in connection with this case. It concerned a communication sent by Mr Relph to Mr McKenzie-Bridle on 2 March 2021. That email stated there had been an urgent meeting of “the board” the previous evening, in which it was proposed that LITC Ltd cease trading, and that a new company be formed with the intention of focusing on long-term accommodation with some short-term. The email stated that as LITC Ltd did not have any assets, it should be wound up.

[75] The email also stated that the Board was in the final stages of appointing a new trustee to take over Mr Relph’s position, and that the incoming trustee would be a shareholder and director of the company.

[76] The email, sent to Mr Wayne Wilkinson care of the Trust, but copied to Mr McKenzie-Bridle, asked him to also supply Mr Relph’s nil income tax returns, as he may need them. The email purported to have been sent on a without prejudice basis.

[77] Mr Relph objected to this email being produced, an issue on which I ruled in an interlocutory judgment issued shortly before the hearing commenced.¹¹ Mr Relph submitted that the contents were “a bit cheeky”. Mr Wilkinson had not in fact wound up the company or arranged a variation of the Trust. He implied the email was not to be taken seriously and should not be regarded as a deception.

[78] The email is relevant for two purposes. First, it was plainly a deliberate attempt to persuade Ms Gestro to give up. Second, it indicated a readiness to take steps that might be taken in an attempt to avoid liability.

[79] A yet further example of such a *modus operandi* is provided by the email sent to the Authority in 2014 for the purpose of Ms Higg’s case.¹²

¹¹ *Gestro v Relph* [2021] NZEmpC 29 at [35]–[39].

¹² Above at [58]–[60].

[80] The flexible use of other entities was also discussed more generally in Mr Relph's evidence. As it was put by Mr McKenzie-Bridle, it is clear that entities come, and entities go, but at the centre is Mr Relph. In short, he is the controlling persona.

[81] Turning now to issues relating to management of the Lodge, there are several factors requiring consideration.

[82] The first is that not only is the Lodge held by Mr Relph as trustee, but so also are its contents, as is confirmed by the Trust's financial statements of 2018/2019. As discussed earlier, the existence of a lease is asserted, but not proven. Nor is the payment of rent. As mentioned, no financial statements, or bank records, for LITC Ltd were produced to establish Mr Relph's assertions.

[83] It was confirmed by Mr Relph and his witnesses that any significant expenditure at the Lodge would have to be authorised by him. Meetings of other entities associated with the Trust, such as the property management company, were held at the Lodge. Mail was delivered there for Mr Relph. It is the registered office for numerous companies of which Mr Relph is a director and/or shareholder.

[84] It is beyond doubt that Mr Davis is heavily involved in management issues, as an individual contracted to the Trust. I find he was under Mr Relph's control as sole trustee. This fact was demonstrated in a variety of respects, from the uplifting of cash on a regular basis by him, through to him being the person Mr Arora contacted when the present proceedings surfaced at the Lodge citing Mr Relph as the defendant. It is significant that he then attempted to resolve this proceeding on behalf of Mr Relph; and that he subsequently clarified he is not an office holder within LITC Ltd.

[85] In evidence, reference was made to other people who were involved in the Lodge's affairs from time to time, and who were either employees of the Trust or engaged by a property management company associated with the Trust.

[86] I have commented earlier on the unreliability of Mr Arora's evidence. I reject his denial that he had told Ms Stiles that Mr Relph was "top dog". On the evidence

which has been placed before the Court, that description is not only apt, but is precisely the sort of term Mr Arora would use.

[87] There are other pointers to the centrality of Mr Relph's role. Although Mr Relph denies it, I accept Ms Stiles evidence that at the time of her employment in 2019 she saw Mr Relph's name on an online accounting database. Mr Relph took photo-shots of some of these in 2021 but they do not disprove her evidence which relates to what she observed two years earlier.

[88] Mr Relph's name is also shown as being the administrator of website rights pertaining to the Lodge.

[89] When Mr Relph wished to make inquiries and take photos at the Lodge in the course of the hearing, he attended the site. It is apparent Mr Arora readily gave him access to the online accounting package which is no doubt private and confidential; and to keys held at the Lodge for properties sited elsewhere, presumably kept to ensure their security could be maintained. Putting aside the purpose of these inquiries, that Mr Relph was able to take these steps is consistent with the fact that he had the right, as controller of the business operation, to do so.

[90] Standing back, I am satisfied that Mr Relph was indeed the controller of the operations of the Lodge business for which Ms Gestro worked. On the evidence before the Court, there is no other individual or entity which can sensibly be regarded as fulfilling this role.

[91] This is a strong factor in favour of the proposition that the real nature of Ms Gestro's employment relationship was that it was with Mr Relph.

Integration test

[92] Under this test, if a person is employed as part of the business and his or her work is done as an integral aspect of it, there is a contract of service.

[93] Applying this test to the facts that I have already reviewed for the purposes of the control test, the same answer is obtained.

[94] The totality of the circumstances strongly suggests that Mr Relph, as controller of the Lodge and its contents, in reality, also controlled and operated the business.

[95] This factor favours a finding that Mr Relph was Ms Gestro's employer.

Fundamental or economic reality test

[96] The final common law test has been variously described as either "the fundamental test", the "economic reality test", or whether the person in a position such as Ms Gestro, was in business on her own account.

[97] Consideration of this factor does not assist in the present case, because it is common ground she was an employee and not an independent contractor.

Real nature of the relationship

[98] Standing back, I am satisfied that Mr Relph was indeed the employer on this occasion. I accept Mr McKenzie-Bridle's submission that nothing could happen without Mr Relph.

[99] I have not been persuaded that LITC Ltd was, in reality, the employer, having regard to the range of factors which point strongly to Mr Relph's direct control of the Lodge business. Mr Davis is adamant he does not provide support to the manager of the Lodge, Mr Arora, as an employee or officeholder within LITC Ltd on behalf of its director Mr Relph, but as a contractor to the Trust of which Mr Relph is the sole trustee.

[100] That LITC Ltd may have paid Ms Gestro wages is not, when compared with the range of other factors I have reviewed, sufficient to establish that this particular entity was in reality Ms Gestro's employer.

Result

[101] A declaration is sought against Mr Relph personally. He says he acted as trustee of the Trust. That may be so, but that could not be an impediment to the grant of a declaration against Mr Relph personally.

[102] It is well established that a trustee is personally liable for all debts incurred in the conduct of a trust, and the personal assets of the trustee are then available to meet the liabilities of the trust. A trustee will normally have an indemnity in the first instance from the assets of the trust in respect of liability for a trust transaction: s 81 of the Trusts Act 2019. But a trustee's right to be indemnified from the assets of the trust may be lost if the trustee has breached duties owing to the trust.¹³

[103] In a case such as the present, then, the appropriate declaration is that Mr Relph was Ms Gestro's employer.

[104] If he wishes, as trustee, to exercise a right of indemnity against the Trust fund if Ms Gestro's personal grievance succeeds, that would be a matter between him and the Trust in due course.

[105] I reserve costs. My preliminary view is that Mr Relph should pay costs to Ms Gestro on a 2B scale. I encourage the parties to resolve any cost issues on the basis of this indication, if possible.

[106] Given, however, that I have not heard submissions on costs, leave is reserved to file memoranda if necessary. Any memorandum on behalf of Ms Gestro is to be filed by 12 July 2021. Any memorandum from Mr Relph is to be filed by 26 July 2021.

B A Corkill
Judge

Judgment signed at 11.20 am on 28 June 2021

¹³ *Foundation Custodians Ltd v Thornton* (2009) 10 NZCPR 661 (HC) at [23]–[24].