IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 122
5376032

	BETWEEN	LUKE KEARNS Applicant
	AND	SOUTHERN INSTITUTE OF TECHNOLOGY Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Craig Smith, Counsel for Respondent
Investigation Meeting:	4 June 2013 by telephone
Submissions received:	12 February 2013 and 20 June 2013 from Applicant 8 March 2013 and 17 June from Respondent
Determination:	26 June 2013

DETERMINATION OF THE AUTHORITY

A. The applicant was, in law, an independent contractor, and not an employee of the respondent.

B. Costs are reserved.

Employment relationship problem

[1] Mr Kearns complains that the respondent breached its duty of good faith bargaining (presumably, in breach of s.60A of the Employment Relations Act 2000 ("the Act")), unilaterally varied his employment agreement and committed a *breach of human rights* (which the Authority does not have the jurisdiction to consider).

[2] The respondent asserts that Mr Kearns' claim is misconceived as Mr Kearns was not an employee of the respondent but was engaged as an independent contractor.

[3] The purpose of the preliminary investigation is to determine Mr Kearns' employment status. If Mr Kearns was not an employee of the respondent but was an independent contractor, the Authority does not have the jurisdiction to consider any of his claims against the respondent.

Brief account of the events leading to the dispute

[4] Mr Kearns marked assignments for the respondent in its Automotive Distance Learning Programme. The students whose work he marked were not enrolled with the respondent but were apprentices with the Motor Industry Training Organisation, known as MITO. The respondent provided services to the MITO apprentices under an agreement with MITO.

[5] Mr Kearns was at the material time the sole director and a joint shareholder of a company called Kearns Training Limited. The Companies Office website shows that this company was registered between 31 October 2000 and 14 September 2012. Mr Kearns marked assignments between April 2003 and 30 December 2011.

[6] The Authority was shown a copy of a contract headed *Contract for Services*, dated 2 May 2011, and signed by Mr Kearns and Ms Winstanley on behalf of the respondent. The contract provides that Mr Kearns would be paid the sum of $14.70 exclusive of GST, per unit standard fully marked and reported, together with the sum of $5.85 where Mr Kearns was required to mark a resit paper. A unit standard consisted of one workbook in skill development and the theory assessment relating thereto. The payments were to be made on the 20th of the month following the presentation of an invoice for services.

[7] This contract was the latest in a series of contracts for services, all in essentially the same terms according to Mr Kearns, which were signed between the parties on an annual or semi-annual basis between 2003 and 2011.

[8] The Authority was shown a copy of an invoice presented by Mr Kearns with the heading *Kearns Training Limited*, which included GST and a GST number.

[9] According to the respondent's statement in reply, the respondent commenced a review of the Automotive Distance Learning Centre in Christchurch in July 2011. This resulted in the Centre's operation being transferred to Invercargill. On 29 July 2011 the Manager of the respondent, Mr Grumball, wrote to Mr Kearns and

advised him that there was no intention of replacing the Programme's contract markers. On 3 August 2011 Mr Kearns wrote to Mr Grumball, Ms Winstanley and another member of the respondent stating that he had been offered a position at Gough, Gough and Hamer in Christchurch and that he was happy to continue to mark papers on a reduced basis.

[10] On 10 October 2011 Ms Winstanley wrote to Mr Kearns thanking him on behalf of the team for his efforts over the years and to say that his support and commitment to the Christchurch campus, often at short notice, were much appreciated. She stated that she wished to acknowledge that his extensive knowledge and skills in dealing with and teaching their students added real value to their operation and she wished him all the best in his new role.

[11] By way of an email dated 29 November 2011 Mr Grumball wrote to Mr Kearns and another marker identified as *Bob*, in the following terms:

> *Firstly thank you for your continued ability to do DL marking for us, especially during the transition phase from ChCh to Invercargill. I thought it appropriate to let you know that due to us now having two full time markers on site in Invercargill the marking sent to you would now be on an overload basis. This may mean that there won't be a regular number or pattern to the marking that you are being sent, but that you would be advised ahead of time by Ruth if there was marking available. The turnaround timeframes will still need to remain at the current 5 days.*
>
> *Hopefully you are still willing to continue with marking on this basis, if not then please let me know so that we can stop sending you material.*
>
> *Thanks.*
> *Mike G.*

[12] By way of an email dated 23 January 2012, sent by Mr Kearns to Mr Grumball and another individual called Penny Simmonds, Mr Kearns wrote as follows:

> *Dear Mike and Penny*
>
> *I have not been happy with the way the review was held or the way that things have been handled since the review. I have discussed the situation with Community Law and the Employment Relations Authority, (Department of Labour)*
>
> *After careful consideration following the discussions, I have concluded that I have a Personal Grievance case against SIT regarding the legality of my employment status as a contractor and*

> *my not being a full time employee. I also have concerns over the handling of the contract when services were moved to Invercargill.*
>
> *As our views will vary considerably I do not believe these issues can be resolved easily between ourselves. Under section 19 of my contract I am formally requesting your voluntary involvement in Mediation through a mediator at the Department of Labour. If voluntary involvement is not forthcoming I will then formally seek to enforce this under provisions in the Employment Relations Act.*
>
> *My intension* [sic] *is to establish the Legality of my Employment status and seeking a redundancy package. If it is found to be incorrect I will then also seek compensation for loss of earnings and humiliation.*
>
> *I request your reply within 14 days of receipt of this email, if no reply is received before 5pm 6th Feb I will assume that you voluntarily give authorization for me to initiate Employment Relation Authority proceedings.*
>
> *Yours sincerely*
> *Luke Kearns*

[13] Through its solicitors, the respondent denied that Mr Kearns had been an employee of the respondent. They also raised the fact that Mr Kearns was required to raise a personal grievance within 90 days of his termination and that he had done so outside of that period.

Preliminary issue

[14] As a preliminary issue, the Authority must determine whether Mr Kearns was an employee of the respondent or whether he was engaged as an independent contractor.

The law

[15] Subsections 6(1) to (3) of the Act state as follows:

> *(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*
> *(b) includes—*
> *(i) a homeworker; or*
> *(ii) a person intending to work; but*
> *(c) excludes a volunteer who—*
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
> *(ii) receives no reward for work performed as a volunteer; and*
> *(d) excludes, in relation to a film production, any of the following persons:*

(i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
(ii) a person engaged in film production work in any other capacity.

(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee

(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 purpose of subsection (2) the court or the Authority –
(a) must consider all relevant matters, including any matters that indicate the intention of the parties; and
(b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.

[16] Mr Kearns submits that he was employed by the respondent as a home worker. *Home worker* is defined in s.5 of the Act as follows:

Homeworker –
(a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
(b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

[17] The word *dwellinghouse* is also defined in s.5 of the Act as follows:

Dwellinghouse –
(a) means any building or any part of a building to the extent that it is occupied as a residence; and
(b) in relation to a home worker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence.

[18] Employment agreement is defined as follows:

Employment agreement –
(a) means a contract of service; and
(b) includes a contract for services between an employer and a homeworker; and
(c) includes an employee's terms and conditions of employment in –

(i) *a collective agreement; or*
(ii) *a collective agreement together with any additional terms and conditions of employment; or*
(iii) *an individual employment agreement.*

Was Mr Kearns a home worker?

[19] Addressing first Mr Kearns' assertion that he was a homeworker, I must firmly disagree. First, I do not believe that Mr Kearns was *engaged, employed or contracted by* [the respondent] *to do work for* [the respondent] *in a dwellinghouse*. This wording clearly indicates that the purpose of the engagement, employment or contract is to do work in a dwellinghouse. I am satisfied that it was irrelevant to the respondent where Mr Kearns did the work of marking assessments. He gave evidence that he needed to be at home because that was where his desk was. Whilst I accept he needed to be in a location with a desk, pens and possibly reference materials he could, I believe, have easily done the marking in a library or a commercial office.

[20] Mr Kearns stressed that he could not have afforded to have hired commercial premises because of the income he earned under the contract for services did not allow for it. Therefore, he said, the contract required him to work from home and, hence, he was a homeworker. With respect to Mr Kearns, who was not represented by any professional advocate or counsel, this logic would make numerous small traders, such as interior designers, web designers, architects, writers and so forth, many of whom run their businesses from home, into homeworkers, which the legislation plainly did not intend to be the case.

[21] Mr Kearns also likened himself to clothing workers, who often work from home, in that, like them, he was a *vulnerable worker*. Apart from the fact that the homeworker provisions of the Act do not make mention of the concept of *vulnerable workers*, Mr Kearns' annual income from his activities with SIT put him well above the concept of a living wage, let alone the minimum wage. With respect to Mr Kearns, the issue of *vulnerable worker* is a red herring that does not assist his arguments.

[22] I refer to the Court of Appeal judgment in *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 in which the Court of Appeal considered that the extended definition of *home worker* would not extend to persons such as artists,

journalists, or designers who choose to work from home but in respect of whom no term can be implied concerning where the work is to be done. I believe that this is exactly the position of Mr Kearns and I see nothing in the contract for services between the parties dated 2 May 2011 which either expressly or impliedly required Mr Kearns to work from his or anyone else's dwelling house. Indeed, it would have been bizarre, given the nature of the work, if Mr Kearns had been engaged, employed or contracted by the respondent for the purpose of doing work for the respondent in a dwelling house.

[23] Therefore, I reject the notion put forward by Mr Kearns that he was a homeworker.

The section 6 tests

[24] I turn, therefore, to section 6 of the Act. The Employment Court in *Chief of Defence v Ross-Taylor* [2010] NZEmpC 22, at [3] cites with approval the Employment Court case of *Singh v Eric James and Associates Ltd* [2010] NZEmpC 1, which confirmed that the inquiry to be carried out by the Authority and the courts in determining whether a party was an employee or an independent contractor is intensely factual. *Ross-Taylor* also replicates at [3] the relevant principles identified by the Employment Court and approved by the Supreme Court in *Bryson v. Three Foot Six Limited* [2005] ERNZ 372. These are as follows:

- Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

- The Authority or the court, in deciding whether a person is employed under a contract of service, is to determine "the real nature of the relationship between them": s 6(2).

- The Authority or the court must consider "all relevant matters" including any matters that indicate the intention of the persons: s 6(3)(a).

- The Authority or the court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s 6(3)(b).

- "All relevant matters" 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.

- "All relevant matters" will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

- "All relevant matters" include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

- Until the Authority or the court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

- Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.

- Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

- Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

[25] *Bryson v. Three Foot Six Limited* held that the starting point is to examine the terms and conditions of the contract and the way it operated in practice and then to apply the three tests traditionally used to determine such matters (namely, the control test, the integration test and the fundamental or economic reality test).

The contractual documentation

[26] The first step in determining this preliminary issue is to consider the documentation that governed the relationship. The Authority was not shown any documentation of a contractual nature that was in place prior to the contract for services dated 2 May 2011 but I accept the evidence of Mr Kearns that the previous contractual documentation was essentially identical in all material ways.

[27] Mr Kearns was identified as *the Contractor* at the start of the contract for services and the preamble of the contract for services stated as follows:

> *WHEREAS:*
>
> *A.* *The Contractor is to perform services for SIT on a fee for service basis as an Independent Contractor and not as an employee of SIT.*

[28] Clause 1 of the contract stated that it commenced on 5 January 2011 and that it would terminate on 30 December 2011.

[29] The remainder of the contract stated as follows:

> 2. ***THE*** *Contractor agrees to provide assessment and marking of Distance Learning Packages ("the services") specified in Schedule A and SIT agrees to pay the Contractor the payments specified in Schedule B. For the avoidance of doubt, the Contractor is not entitled under this contract to any sick leave, superannuation benefits, penal rates, holiday pay, redundancy pay, transport allowance or special allowance unless specifically provided for.*
>
> 3. ***THE*** *relationship between SIT and the contractor shall at all times be that of independent contractor and at no time shall there be any element of agency in the relationship between the parties, and the contractor shall not be entitled in any way to enter into an agreement, undertaking or understanding which might bind SIT nor will SIT do likewise in relation to the contractor.*
>
> 4. ***THE*** *Contractor will, where applicable, be registered for GST.*
>
> 5. ***ACCIDENT*** *Compensation levies and employer insurance premiums are the responsibility of the Contractor.*
>
> 6. ***THE*** *Contractor shall be a qualified person in accordance with current SIT requirements. Proof of these qualifications shall be submitted to SIT's Human Resources Manager. The Contractor must provide services in accordance with the education service and quality specifications.*
>
> 7. ***THE*** *Contractor shall, have no claim against SIT in respect of any matter arising from this contract except for non-payment by SIT of any sums properly invoiced.*
>
> 8. ***SIT*** *shall provide the Contractor with equipment to be determined by the Head of Faculty in consultation with the Contractor, and SIT shall ensure that the Contractor or any persons providing services pursuant to this contract are provided with good and safe working conditions.*
>
> 9. ***THE*** *Contractor and any persons providing services pursuant to this contract shall comply with all legislative requirements ….*
>
> 10. ***THE*** *Contractor shall consult regularly with the Head of Faculty on the standard of performance for the services specified in this contract.*
>
> 11. ***SIT*** *may carry out evaluations as to the standards and quality of the services specified in this contract. For this purpose, the Contractor shall allow SIT at all reasonable*

times to review the delivery of the said services in such a manner as SIT deems necessary.

12. ***THE*** *Contractor shall keep records of the services provided pursuant to this contract as directed by SIT and shall keep such records in a secure place. Such records shall be made available to SIT at all times.*

13. ***THE*** *contract price and services provided under this contract shall be reviewed on 1 months notice in the event of any of the following:*

    (a) Changes to indirect taxation or Government policy which materially impact on the terms of this contract;
    (b) Alternation in the activities of SIT which materially impact on the terms of this contract;
    (c) Any consequences of a civil or national emergency which materially impact on the terms of this contract.

    Following such a review, any changes to this contract, should they be necessary, must be agreed by both parties.

14. ***THE*** *Contractor shall at all times keep SIT fully indemnified in respect of all actions, proceedings, claims, demands, costs and expenses whatsoever which may be brought against SIT arising from a breach of this contract by the contractor.*

15. ***IF*** *SIT is of the opinion that the services specified in this contract are not being satisfactorily provided or that the Contractor is not meeting the obligations under this contract, SIT may, by notice in writing to the Contractor, specify in what respect the work is unsatisfactory and require the Contractor to improve or amend the services provided within two weeks from the date of the notice. Should the Contractor fail to comply with such notice SIT may terminate this contract. Such termination shall not afford the Contractor grounds for any claims or damages, compensation or costs.*

16. ***NOTWITHSTANDING*** *Clause 17 or if the Contractor shall make default in any one or more of the following respects.*

    (a) Fails to proceed with the provisions of the services or any part thereof with due diligence;
    (b) Fails to provide the services or any part thereof in a competent manner;
    (c) Is otherwise guilty of a substantial breach of the provisions of this contract;

    Then in such case SIT may cancel this Contract immediately.

17. ***EITHER*** *party may elect to terminate this contract on and from a date to be specified in a notice served on the other party, such date being not less than fourteen days from the date of the notice. Termination under this clause is without prejudice to the rights and obligations of the parties which may have arisen before the date of termination and which*

may be enforced as if the contract continued in respect of them.

18. ***ANY*** *notice required to be given under this contract shall be in writing and may be served by:*

    (a) giving the notice personally to the party; or
    (b) leaving the notice at the party's place of business in which such case the notice shall be deemed to have been duly served at the time it is so given or left; or
    (c) by posting the notice addressed to the party at the party's last known place of business, in which case the notice shall be deemed to have been duly served at the time of delivery in the ordinary course of post.

19. ***SHOULD*** *any dispute arise as to the operation of this contract, then the parties shall meet in good faith and attempt to resolve the dispute between themselves. Should the parties fail to resolve the dispute in this manner, then the terms of the dispute shall be reduced to writing and the matter shall be finally referred to Arbitration under the Arbitration Act 1996. Such reference shall be deemed to be a submission to Arbitration by the parties. The parties shall agree to a single Arbitrator, who shall decide the dispute according to the law of New Zealand. The decision of the Arbitrator shall be final and binding on the parties. In the event of the parties being unable to agree to a single arbitrator, the President of the Southland District Law Society shall appoint one.*

20. ***THE*** *Contractor shall not at any time either directly or indirectly utilise or divulge to any person any knowledge or information which he/she has acquired during the term of this contract concerning the business affairs, property or other activities of SIT and shall use his/her best endeavours to prevent the above publication or disclosure of the same.*

21. ***NO*** *variation of this agreement shall be effective unless it is in writing and signed on behalf of SIT and the contractor by properly authorised signatories.*

22. *The contractor shall not subcontract all or any portion of marking.*

[30] Schedule A of the contract for services required Mr Kearns to contact the DLP (Distance Learning Programme) administrator on a daily basis to ascertain the respondent's requirements for marking and to uplift such packages from its premises. Mr Kearns had to mark and return the packages to SIT within five working days. He was required to mark the packages abiding by the terms and conditions agreed to between SIT and MITO and had to comply with the NZQA guide for marking tertiary exam papers.

[31] Mr Kearns also had to contact students when required to clarify or verify written answers in the DLP packages in compliance with the MITO's Distance Learning contract, NZQA practice, and the MITO workplace answer guide. SIT agreed to make available to Mr Kearns a telephone at his premises for the purposes of such communication. Finally, Mr Kearns had to make his services available to complete a minimum of 20 packages per week if required.

[32] To all intents and purposes, this contract for services appears, on its face, to be a classic independent contractor's agreement. It states expressly that Mr Kearns was an independent contractor and not an employee; it required him to submit invoices; it required Mr Kearns to indemnify the respondent; it imposed on Mr Kearns (under clauses 10, 11 and 12, for example) obligations which an employer would not expect to have to expressly spell out; it provided an arbitration clause; and it expressly referred to the provision of equipment, a telephone and a prohibition against subcontracting which, again, an employer would not normally have to spell out in a contract of employment.

[33] Conversely, the contract lacks many clauses that one would expect to see in an employment agreement, such as an employee protection clause and a plain language explanation of the services available for the resolution of employment relationship problems, required by s.65(2)(vi) of the Act. Therefore, taking into account the contract documentation alone, it would appear that Mr Kearns had entered into a contract for services which meant he was an independent contractor and not an employee.

[34] Mr Kearns says that when he first started his relationship with SIT, he had been in receipt of ACC payments, and that the Corporation monitored the work he did for SIT until it was satisfied that the work was more like an employment relationship, and that *they then signed it off*. The Authority saw no independent evidence of this. However, I must say I believe it unlikely that ACC had any concerns whether Mr Kearns was an independent contractor or an employee. I strongly suspect that their concern was that Mr Kearns had sufficiently recovered from his injury so that he was vocationally independent. I am therefore going to disregard this evidence.

[35] Mr Kearns also explained that, when he was first given the contract in 2003, he took it along to his accountant who advised him to register for GST. Mr Kearns did so, and also changed the name of his company (established in 2000) from

Commercial Vehicle Rentals Limited to Kearns Training Limited. Mr Kearns did not say in evidence that his adviser doubted that the relationship was an independent contractor one, or that it was actually that of a homeworker, nor did Mr Kearns say that he himself had always doubted that it was. Indeed, his own evidence is that he had signed the same contract for services every year until 2011.

[36] At no point, until January 2012, does it appear that Mr Kearns or his accountant questioned Mr Kearns' employment status. The notion of him being a homeworker was only introduced, it appears, in February 2013, in Mr Kearns' first written submissions.

[37] These facts not only demonstrate that the first in the series of contracts for services recording Mr Kearns' status as that of an independent contractor was seen by Mr Kearns' accountant (and this is an area of the law with which accountants are very familiar, generally speaking, because of the tax implications of being a contractor) but also strongly point to the intention of the parties being that Mr Kearns would be an independent contractor. The terms of the agreement are quite unambiguous in this sense. It is therefore my conclusion that the intention of the parties was that Mr Kearns was an independent contractor, engaged under the terms of a contract for services.

[38] Whilst the intention of the parties is persuasive in determining the real nature of the relationship, s. 6 (3) requires the Authority to undertake a wider enquiry, including examining *divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice* (*Chief of Defence Force v Ross- Taylor*, at [3]).

[39] Therefore, it is necessary to look at the actual day to day practice that occurred between the parties and to stand back and look at the overall picture. One may be assisted in doing this by applying the three tests referred to in *Bryson*.

The control test

[40] This examines the extent to which the activities of Mr Kearns were controlled by the respondent. Mr Kearns refers to clauses 10, 11, 12, 15 and 16 to support the contention that he was working under the control of SIT. However, I do not believe that these clauses, in themselves, indicate that Mr Kearns was an employee of the respondent. Because of the nature of the services to be provided, it was necessary for

certain minimum standards to be upheld by Mr Kearns. One would expect these equally of an independent contractor as of an employee. Similarly, the keeping of records by Mr Kearns, which would be open to inspection by the respondent, is perfectly in keeping with the nature of the services to be provided.

[41] Mr Kearns states that he had no control over how, where and when the work was to be done. I agree that he had restricted control (but not no control) over how and when it was to be done but clearly he had control over where it was to be done. With respect to how it was to be done, he was required to comply with quality requirements, but it was not the case that the respondent guided Mr Kearns in the way he carried out the work. That is to say, the respondent relied upon Mr Kearns' expertise to ensure that he did the work correctly.

[42] As to when the work was to be done, apart from having to mark the packages within five working days, he could choose to do so at any time of the day or night. However, I do not see a difference between these requirements and requirements that a commercial enterprise might place upon a painter or plumber, say, where the painter or plumber was required to get a particular job finished within a fixed amount of time.

[43] Mr Kearns points out that he did not supervise the work of others. However, whilst this is true, this was not necessary and, as far as the Authority can tell, there were no other staff to supervise in any event. Mr Kearns states that he could not negotiate the price he was paid. The Authority has not seen any evidence to say whether this is true or not. However, assuming that that is true, that, again, does not in itself indicate that the relationship was one of an employment relationship as it is often the case that large organisations, when contracting out certain services, will have a set budget which they must keep to, and which the contractor must take or leave.

[44] It is noted that the contract forbade Mr Kearns from contracting out his work. The respondent explained that this was because they needed to keep an eye on the quality of the marking. I note that the work of Mr Kearns, and that of his colleagues, was moderated from time to time by MITO, to ensure consistency of standards. The prohibition on sub-contracting is therefore understandable given the nature of the work. I do not believe, therefore, that the prohibition on sub-contracting is particularly determinative of an employment relationship.

[45] Overall, I believe that the control test superficially supports an analysis of the relationship being one of an employment relationship but that, when one considers the nature of the services that needed to be carried out, by their very nature the respondent had to control to a reasonable extent aspects of the delivery of the service. I do not, therefore, believe that the control test is particularly persuasive of the argument that Mr Kearns was an employee.

The integration test

[46] The integration test looks at the extent to which the individual is integrated into the respondent. As Mr Kearns submitted, by way of contrast, an independent contractor could be seen as being only an accessory to the organisation.

[47] Mr Kearns relies on the fact that the respondent's tutors (who were employees) would also mark assignments and assessments during MITO off job training or when fulltime tutoring staff members were short on teaching hours. However, I believe that this is not particularly persuasive given that Mr Kearns was engaged specifically to mark assessments rather than to mark assessments and to teach. Mr Kearns said that he was also asked to carry out tutoring if a staff member was sick, or away for some reason. Again, this appears to have been done on an ad hoc and unusual basis. Therefore, I do not believe that Mr Kearns can persuasively argue that he was on a par in terms of his duties with fulltime employees of the respondent. The vast bulk of his responsibilities involved marking assessments and the fact that other fulltime employees occasionally did this does not equate his status with theirs.

[48] Mr Kearns states that the respondent provided *equipment* to Mr Kearns. However, upon questioning Mr Kearns, he stated in evidence that this amounted to some pens. He says that the respondent painted his desk (although this seems to have been an informal arrangement carried out by the workshop). He also said that the respondent did his photocopying and paid for telephone calls. He used his own computer and he had bought some cheap stamps with which to mark work. In summary, there seemed to be limited equipment needed in the carrying out of his work.

[49] One aspect of the relationship that needed attention was the fact that it had gone on so long under a series of agreement and with, it seems, Mr Kearns being

devoted entirely to carrying out duties for the respondent. On its face, this suggests a long term employment relationship. However, the respondent explained that the respondent's contract with MITO was itself renewed on an annual basis and that the markers' agreements were aligned to the MITO agreement. This arrangement was because the MITO contract is linked to annual funding grants from the Tertiary Education Commission. In light of this, the annual renewals of the arrangement with Mr Kearns can be explained, and does not betoken anything untoward on the part of the respondent.

[50] Mr Kearns cited the case of *Thompson v Tauranga Environmental Centre Charitable Trust* [2011] NZERA Auckland 189 to argue that him being asked to sign a series of contracts was invalid. However, in *Thompson* the Authority was not determining whether Ms Thompson was an employee or an independent contractor, and its finding in respect of Ms Thompson's series of fixed term contracts was based upon the requirements of s. 66 of the Act, which only applies to employees. *Thompson* is therefore not relevant to the present case. For the same reason, Mr Kearn's citing of *New Zealand Educational Institute (Inc.) v Board of Trustees of Red Beach School* AA437/05 is not relevant to the present case.

[51] I agree with Mr Kearn's submission that an employment agreement as well as a contract for services can be terminated on 14 days' notice, although this very fact shows that this factor in the agreement is neutral as to Mr Kearn's status.

[52] As far as the long term nature of the arrangement is concerned, I believe that this is a function of the specialised nature of the marking role and I infer that the respondent's requirements did not change materially over a long period of time. Mr Kearns chose not to carry out other work because he was kept busy enough working for the respondent.

[53] Mr Kearns operated largely from home, working alone, and did not appear to interact with his fellow markers a great deal. In addition, although he kept his own records, he did not have to give copies to the respondent. He says that the respondent did not visit his premises to ensure he was operating safely, and he had never been disciplined, although he would occasionally discuss matters with the Head of Distance Learning in Christchurch. *He was not otherwise told what to do*, he said in evidence.

[54] Mr Kearns also said that he was never given an ID card by the respondent (possibly because there was none) but he had been offered a key, and the alarm code, which he had refused to take. This demonstrates, in my view, the way Mr Kearns viewed the respondent. An employee who was fully integrated into its employer's business would be less likely to refuse to take a key for access to their workplace.

[55] Overall, considering the integration test, I do not believe that Mr Kearns was closely integrated into the business of the respondent, which tends to indicate that he was not an employee.

The fundamental test

[56] The fundamental or economic reality test examines the extent to which Mr Kearns took on financial risk himself in providing his services. Mr Kearns did not appear to take on a great financial risk himself (save, arguably, in terms of the indemnity he signed up to in the contracts). He did not need to purchase stock, or incur any significant expenses. However, this is not so much because of the nature of the relationship, in my view, but is a function of the nature of the work being done, which required little expenditure.

[57] There was nothing in the contract for services which prevented Mr Kearns from working for other organisations. Mr Kearns has submitted that he could not have carried out such work because it would have created a conflict of interest if he had worked for other educational establishments. However, I do not share this view, and the respondent has never, it seems, prohibited him from working for other colleges and polytechnics. Mr Grumball said that the conflict would only occur if Mr Kearns had done his marking directly for MITO or did MITO marking for another polytechnic. It is not unusual for a contractor to be prohibited from carrying out work for a competitor.

[58] Mr Kearns argues that there were no financial penalties that the respondent could impose upon him if his work was not done to standard. However, I disagree. For example, clause 16 enabled the respondent to cancel the contract immediately if Mr Kearns failed to proceed with the provisions of the services or any part thereof with due diligence or failed to provide the services or any part thereof in a competent manner. Furthermore, clause 14 required Mr Kearns to keep the respondent fully indemnified in respect of all actions, proceedings, claims, demands, costs and

expenses whatsoever which may be brought against the respondent arising from a breach of the contract by Mr Kearns. This indemnity had the effect of protecting the respondent even though the respondent did not require Mr Kearns to arrange his own insurance including public liability cover.

[59] Mr Kearns did not, on a day to day basis, take on any significant financial risk in working for the respondent. If he had, that would go towards indicating an independent contractor relationship. However, the absence of such risks does not indicate an employee relationship where the nature of the work does not require a great financial risk to be taken in any event. This test is somewhat inconclusive in my view therefore.

The overall picture

[60] This is not a case where an individual with little bargaining power was simply told by an employer he is an independent contractor and has no say in the matter. First, Mr Kearns was given a series of agreements which set out clearly the status of the arrangement and its implications. I refer, for example, to the following clauses:

> *2* *…For the avoidance of doubt, the Contractor is not entitled under this contract to any sick leave, superannuation benefits, penal rates, holiday pay, redundancy pay, transport allowance or special allowance unless specifically provided for.*
>
> *3* *THE relationship between SIT and the contractor shall at all times be that of independent contractor….*
>
> *5* *ACCIDENT Compensation levies and employer insurance premiums are the responsibility of the Contractor*.

[61] Second, Mr Kearns consulted an accountant in relation to the agreement and was told to register for GST. Mr Kearns also changed the name of his trading company and used it for the purposes of his arrangements with the respondent. Third, Mr Kearns received the remuneration without any deduction for tax.

[62] His Honour Judge Travis, in *Ross-Taylor*, cites with approval at [28] a passage of Lawton LJ in his judgement in the English case *Massey v Crown Life Insurance* [1978] 1 WLR 676, as follows:

> *In the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment*

> *the union between fairness, common sense and the law is strained almost to breaking point.*

[63] I am very mindful of the fact that Mr Kearns operated without complaint under the arrangement he now seeks to characterise as an employment arrangement for several years and, throughout that time, no doubt, *obtain*[ed] *tax advantages for himself* in so doing. Whilst there are elements of the arrangement which suggest the relationship was that of an employee, the overall picture, taking into account the fact that Mr Kearns operated through a trading company, submitted GST invoices, and was party to a series of contracts for services which were unequivocal in their terms (and which led me to conclude that Mr Kearns and the respondent intended him to be an independent contractor) satisfies me that the real relationship between the parties was that of principal and independent contractor.

Determination

[64] In summary, I conclude that Mr Kearns was an independent contractor and, accordingly, that the Authority does not have jurisdiction to consider his claims.

Costs

[65] The parties should attempt to agree between themselves how costs are to be dealt with but, in the absence of such an agreement within 28 days of the date of this determination, the respondent may serve and lodge a memorandum seeking a contribution to its costs and Mr Kearns shall have a further 14 days to serve and lodge a response.

David Appleton
Member of the Employment Relations Authority