IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 121
5393536

	BETWEEN	CHRIS BOSTOCK Applicant
	AND	JENKINS EARTHWORKS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Peter Moore, Advocate for Applicant Jeremy Paterson, Counsel for Respondent
Investigation Meeting:	30 April 2013 and 27 May 2013 at Christchurch
Submissions received:	30 May 2013 and 13 June 2013 from Applicant 6 June 2013 and 18 June 2013 from Respondent
Determination:	26 June 2013

DETERMINATION OF THE AUTHORITY

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

B. Costs are reserved.

Employment relationship problem

[1] Mr Bostock raises a personal grievance that he was unjustifiably dismissed from his employment as a truck driver on or about 28 June 2012. He also claims holiday pay, public holiday pay and reimbursement of Kiwisaver contributions. He also alleges a disadvantage in relation to an allegation that the employer failed to take due care to minimise or eliminate workplace hazards that he was exposed to.

[2] The respondent denies that Mr Bostock was ever an employee of the company, asserting that he was at all times an independent contractor. The respondent therefore asserts that the Authority has no jurisdiction to consider Mr Bostock's claims.

[3] The purpose of the investigation meeting was confined to considering the preliminary issue of whether Mr Bostock was an employee of the respondent company.

Brief account of the events giving rise to the termination of the relationship

[4] Mr Bostock began working for the respondent company in around November 2011 when an acquaintance of his, Mr Pittaway, called him and told him about the job opportunity in Christchurch. At the time, Mr Bostock was living in Oamaru and Mr Pittaway was working for the respondent company.

[5] Mr Bostock also spoke to the owner of the respondent company, Mr Jenkins, and gave evidence that Mr Jenkins told him that the rate would be $25 per hour. As he was out of work and was very keen to work, he accepted the offer immediately and travelled up to Christchurch the following day. According to Mr Bostock's evidence, there was no discussion about Mr Bostock being treated as a contractor or about any other aspects of the arrangement.

[6] This is contrary to the evidence of Mr Jenkins who stated that he did explain to Mr Bostock over the telephone that the job would be working as an independent contractor, that he would not be entitled to annual leave or sick leave but that the rate was higher than they would pay a driver on a wage, that he would have to invoice Jenkins Earthworks on a weekly basis and be required to organise his own tax returns and that the company's public liability insurance covered him as an independent contractor.

[7] As to this particular conflict of interest between Mr Bostock and Mr Jenkins, neither man seemed to have a detailed recall of the conversation when giving oral evidence, although Mr Jenkins acknowledged that he probably did not explain to Mr Bostock about him being an independent contractor in the same detail as he states he did in his written brief of evidence. From this I infer that the written evidence in this respect has had the benefit of hindsight and wishful thinking. However, I do accept Mr Jenkins' evidence that he would generally tell all new workers the information that he says that he gave to Mr Bostock. I believe that Mr Jenkins got

into the habit of doing this, although I am not convinced that he had got into that habit at the time when Mr Bostock was taken on, as the company was still relatively small at that point.

[8] In any event, Mr Bostock's evidence was that he did not really give much thought to what status he had at the time and that he just was pleased to have the work.

[9] The evidence of Mr Jenkins was that Mr Bostock was a good worker and, because he was staying in accommodation in Christchurch provided by the company for a number of the workers, was generally available for work whenever he was needed.

[10] There was some uncertainty concerning the evidence given by the parties about the invoices that Mr Bostock produced. The respondent company disclosed a number of invoices which purported to come from Mr Bostock but which Mr Bostock states that he did not recognise. It was the evidence of the respondent that these invoices were emailed to the company, either by or on behalf of Mr Bostock. It was Mr Bostock's evidence that he prepared handwritten timesheets, copies of which he would hand to the operations manager, Mr Maze. He also said that he did get his step-daughter to assist him at some point with preparing his invoices.

[11] On this particular point, it is my conclusion, on balance, that the invoices that Mr Bostock did not recognise were prepared by his step-daughter using the information given to her by him, probably from the handwritten timesheets. Mr Maze stated in evidence he could not remember seeing the timesheets. I do not believe there is anything sinister in the differences in recollection of the witnesses and it is common ground that Mr Bostock did later produce invoices which were emailed to the company. Mr Bostock's evidence was that he was shown by a fellow worker about the need to prepare invoices in order to get paid. It is my understanding that the information from the fellow worker would have included information about the 20% withholding tax that Mr Bostock included in his invoices.

[12] Mr Bostock also had the advice of an accountant who clearly treated him as an independent contractor for tax purposes. Mr Bostock did not know why his accountant did that, although, as there was no written documentation characterising him as an

independent contractor, it is likely because Mr Bostock told him that he was one, or was being treated as one.

[13] Mr Bostock's evidence is that he rarely took holidays, although when prompted by the respondent, he did recall a reasonably lengthy holiday over the 2012 Easter period. He also stated that it did not occur to him whether or not he could do other work outside of the respondent company as no one told him he could. It was Mr Jenkins' evidence that, whilst Mr Bostock may not have carried out other work during his association with the company, other drivers did so and that that was accepted as being part and parcel of the arrangement. It would appear that Mr Bostock worked regularly and frequently for the respondent because of his availability, being on hand in the company provided house.

[14] It was accepted by both parties that personal protective equipment (PPE) such as hard hats, high visibility vests, gloves and so forth were provided by the company to Mr Bostock and other workers. Mr Jenkins explained in his evidence that this was because of the onerous demands on demolition companies with respect to health and safety legislation and that the companies were often audited (sometimes covertly, according to Mr Maze) and that he wanted to be sure that all the workers were compliant with the obligations so as to satisfy the project managers and the ultimate customer, the insurance companies. It would appear that this equipment provided by the respondent was generic, and did not bear the company logo. I accept Mr Jenkins' evidence about the PPE and the reasons he supplied it.

[15] It would appear that Mr Bostock was working reasonably happily without major incident until Mr Jenkins terminated the arrangement, essentially without giving him any warning or notice.

Was Mr Bostock an employee or an independent contractor?

[16] Subsections 6(1) to (3) of the Employment Relations Act 2000 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 purposes 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 their relationship.

[17] The leading case in determining whether an individual is an employee or an independent contractor is the Supreme Court case of *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372 which 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 (the control test, the integration test and the fundamental or economic reality test).

[18] 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. *Singh v Eric James and Associates Ltd* [2010] NZEmpC 1.

[19] The Employment Court in *Chief of Defence v Ross-Taylor* [2010] NZEmpC 22 set out principles that need to be considered in determining the issue, which are based on those set out by the Employment Court, and approved by the Supreme Court in *Bryson*. The *Ross-Taylor* principles are:

- *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.*

The intention of the parties

[20] In examining the intention of the parties, despite the submissions of the respondent, I do not accept that it is possible to ascertain this with any certainty. There was no written contract recording the relationship, and the parties disagree as to what Mr Bostock was told at the start of the relationship. Whilst Mr Jenkins certainly intended Mr Bostock to be a contractor rather than an employee, Mr Bostock appears not to have addressed his mind to the nature of the relationship, at least as far as its legal status was concerned. However, he did acknowledge that the term *contractor* was mentioned to him at some stage. This does not accord an intention on his part though.

[21] It is my conclusion that there was no meeting of minds between the parties as to what Mr Bostock's status would be, and no common intention can be established in the absence of a *consensus ad idem*. In the absence of any certainty about the parties' intentions it is necessary to turn to an examination of the reality of the arrangement between the parties, applying the three traditional tests.

The control test

[22] Turning to the first of the traditional tests, which examines the extent to which the activities of Mr Bostock were controlled by the respondent, there is no doubt that he had to do what he was told to do, mainly by Mr Maze.

[23] Mr Moore, on behalf of Mr Bostock, relies on a number of factors to argue that the control test supports an analysis of Mr Bostock being an employee. These factors are:

a. He could not control which hours he had to work;

b. He was told which sites to service and was under the immediate control of the digger driver, who loaded the trucks with demolition debris;

c. Mr Maze directed both truck drivers and digger drivers;

d. Mr Maze could discipline Mr Bostock;

e. Mr Bostock was obliged to request when he could go on leave;

[24] In my view, this is one of those, not infrequent, cases where the control test is not particularly enlightening, because of the nature of the tasks to be carried out. Mr Bostock was not told how to drive his truck, only where to do so. One would not expect him to be told how to drive his truck, as he was a qualified driver for the type of truck he drove. However, he had to service demolition sites which were ready for him, and could only take rubble to certain tips during their hours of operation. The only discretion appeared to be that Mr Bostock (and the other drivers) could occasionally work out for themselves which demolition site to go to at any particular time, although this was dictated by the stage which the sites had reached, and the desire not to have trucks sitting idle.

[25] Addressing the points identified by Mr Moore above, my conclusions are:

a. In respect of Mr Bostock not having much discretion over his hours, this is a function of the needs of the role, rather than of the relationship between him and the respondent in my view. This is no different from a plumber only being able to repair a leak in an office at a time when access would be granted to him. A plumber cannot unilaterally decide he will repair the leak at 3am in the morning, unless the owner of the office agrees.

   I do recognise that a plumber will have some discretion as to when he would turn up at a job, whereas Mr Bostock had little discretion. However, I note that Mr Pittaway gave evidence that he managed to negotiate after-hours access with Lyttelton port for a while, which I presume would have been open to Mr Bostock to do. This, though, is a minor discretion.

b. In respect of being under the direction of the digger driver, again, this is a function of the role, rather than the relationship. Mr Bostock could hardly take his truck to the tip if it had not yet been filled with rubble, just as a plumber could not repair a leak until he had been given access to it. This factor is, therefore, inconclusive.

c. In respect of being under the direction of Mr Maze, again, I believe that this is a function of the particular role rather than the relationship between the parties. As Mr Paterson points out, in the building industry it is necessary to have an operations manager (who may go by other titles) who directs the workers to their different tasks. Such an activity is a necessary part of the nature of the business, and one could never have any worker working independently, for logistical and health and safety reasons. Therefore, this factor is inconclusive.

d. In respect of the fact that Mr Maze could discipline Mr Bostock, evidence was somewhat sparse as to the extent to which this disciplining could occur. It appears that Mr Maze would certainly orally chastise the workers, but no evidence was given that there was a formal process that was followed. My impression was that there was

not such a process. Again, in the building industry, it must be the case that contractors are able to be directed when there is a need. If Mr Bostock had been taken through a formal disciplinary process, then that would point to an employment relationship. However, in the absence of such a process, this factor is inconclusive in my view.

e. In respect of whether Mr Bostock was obliged to ask to go on leave, the evidence of Mr Maze was that, *although it was a pain sometimes*, he never said no to anyone *because it was a contract situation*. What is not clear is whether there was an obligation on the workers to ask permission if they wanted to have time off. If there was such an obligation, that would point to an employment relationship. However, I infer from Mr Maze's evidence that there was no such obligation. If he never declined a request on the principle that the workers were contactors, that would imply that, in practice, the workers were merely informing him of their absence rather than seeking permission.

[26] Given all these factors in the round, I think the control test in this case is inconclusive as to whether Mr Bostock was an employee.

The integration test

[27] Turning to the integration test (which examines the extent to which Mr Bostock was integrated into the respondent's business) Mr Bostock drove the trucks supplied by the respondent and used its personal protective equipment (PPE). Mr Jenkins explained that it was more cost effective for him to own his own trucks, compared to renting them from owner drivers or another company. Whilst I do not doubt that is true, the fact remains that Mr Bostock did not supply his own truck. If he had, that would have strongly suggested he was an independent contractor. The converse does not necessarily strongly suggest he was an employee, but it does point in that direction. It was the choice of the respondent to supply its own trucks, and there was evidence that at least one driver (Mr Pittaway) had his own truck and that Mr Jenkins paid a separate rate for the use of it. In such circumstances, where the respondent exercises a choice, the ramifications of that choice in terms of the integration test cannot be ignored.

[28] I accept the evidence of Mr Jenkins that he supplied the PPE to ensure that the drivers (and consequently, the respondent company) were all compliant with the stringent regulatory and statutory health and safety requirements prevalent in the demolition industry. Whilst Mr Jenkins chose to supply his own trucks for costs efficiency purposes, I believe that the provision of PPE derived from a stronger and different imperative; namely to ensure that the company operated legally. This might be said to make a difference in terms of the effect on the integration test. I believe it does. I believe that it would be understandable and reasonable for the respondent to make an independent contractor, such as a plumber fixing a leak in its depot, to comply with the respondent's health and safety standards while on its premises. In the case of the plumber working in a risky environment, where air borne asbestos might be present for example, that obligation may well extend to the customer supplying specialist PPE. That would not turn the plumber into an employee. It would simply ensure compliance with the company's health and safety imperatives whilst the contractor was operating on its premises. This factor, therefore, does not turn Mr Bostock into an employee in my view.

[29] Mr Moore points to the fact that Mr Bostock worked in a team with the digger driver and a labourer to suggest an employment relationship. However, this does not, in itself, point to the relationship being one of an employee. Once again, it is the function of the work to be done, rather than of the relationship. Shearing gangs work in teams, for example, but are usually independent contractors. This factor is also inconclusive in determining whether Mr Bostock was an employee in my view.

[30] Mr Moore also points to Mr Bostock being paid a flat $25 an hour rather than per load or some other variable method. This, again, is not particularly conclusive I believe as independent contractors often do receive remuneration on an hourly basis. Indeed, lawyers primarily charge on a time basis, for example. In addition, the fact that the remuneration Mr Bostock received was not variable in accordance with his industriousness, say, could point away from an employment relationship, where overtime and/or bonuses are sometimes part of the remuneration available to an employee but rarely to an independent contractor.

[31] The parties are in conflict as to the significance of the rate of $25 an hour, and whether it is indicative of a contractor's rate. Mr Moore submits that rate of remuneration it is not one of the relevant tests in common law. He states that it can

only be relevant as an indication of the intentions of the parties. I have some sympathy with this view, but believe that rate of remuneration is one of the many factors that can be taken into account in assessing the status of a worker.

[32] Mr Paterson submits that it is close to the Tradestaff rate of $26.66 an hour, and that Mr Pittaway gave evidence that he is receiving $20 an hour as an employed driver. Mr Moore presented a range of evidence from different sources which showed that employee truck drivers could expect anything from $18 to $25 an hour, with the latter rate being more likely after the earthquake as demand for rubble truck drivers increased. However, these facts cannot be taken as strongly indicative of Mr Bostock's status as there are many variables at play, including how experienced a driver is, what the state of the market is at the time of hiring, what the driver is transporting, how the driver is sourced, and what else is offered as part of the remuneration.

[33] In Mr Bostock's case, he was provided with accommodation on a shared basis at the nominal cost of $20 a week, which Mr Bostock said *was part of our pay*. This must have added significantly to the value of the remuneration, as Mr Bostock did not have to pay rent out of his pay, which in Christchurch in late 2011 and 2012, even on a shared basis, would have cost him a significant proportion of his weekly pay. On balance, I believe that the rate offered points more to a contractor rate rather than an employee rate.

[34] In conclusion, on the face of it, I believe that the integration test points to Mr Bostock being an employee. However, when one considers the context in which Mr Bostock's work was done, the relevant factors are more a function of the environment than the actual relationship itself. Therefore, again, I believe that this test is somewhat inconclusive.

The fundamental or economic reality test

[35] Applying the fundamental or economic reality test which examines the extent to which Mr Bostock took on financial risk himself in providing his services, the fact that Mr Bostock submitted invoices, that withholding tax payments were made, and that he claimed tax deductions all point to him being an independent contractor.

[36] Mr Moore states that he regards Mr Bostock's actions in submitting invoices as no more than submitting timesheets, and that Mr Bostock can be compared to that

of Mr Bryson in *Bryson v Three Foot Six Limited* in this regard. However, in *Bryson*, the invoice was supplied by the company, and was called a *CREW TIME CARD/TAX INVOICE*. In Mr Bostock's case, he created his own invoices or had his stepdaughter do so.

[37] Many of Mr Bostock's invoices are, in fact, a sort of hybrid document, comprising a breakdown of hours worked each week, but also including Mr Bostock's full name and contact details, his tax number, his hourly rate and 20% withholding tax. He also included the cost of telephone calls on at least one invoice. Mr Bostock was not registered for GST.

[38] Whilst the fact that Mr Bostock submitted invoices points to an independent contractor's relationship, I am mindful of the fact that he was told that this was what he had to do in order to get paid.

[39] More relevant, perhaps, is that Mr Bostock's tax position was clearly that of an independent contractor. Whilst Mr Bostock's evidence was that he essentially knew nothing about being a contractor and did not really understand the tax implications, he did have an accountant and that accountant appears to have treated him as a contractor in respect of Mr Bostock's work for the respondent. For example, there is reference in Mr Bostock's 2012 individual tax summary (IR3) to both PAYE deductions and tax deducted from schedular payments. There is also reference to expenses being deducted from Mr Bostock's taxable income.

[40] There was no evidence before the Authority that Mr Bostock in any way protested against the way that he was paid, the need to submit invoices, the withholding of 20% tax from his weekly payments or the fact that he did not receive an employment agreement, for example.

[41] 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.*

[42] It is likely to be the case that Mr Bostock gained financially from being treated as an independent contractor. However, Mr Bostock's evidence suggested that he was really just doing what he was told, with little idea of the ramifications. Whilst Mr Bostock's professed naivety about his tax affairs seems unlikely, I believe that he is not trying to deceive the Authority in this regard. Therefore, LJ Lawton's strictures cited above should not be applied to Mr Bostock too sternly.

[43] There are other issues to take into account under the heading of the fundamental test. Mr Bostock did not contribute in any way to the running costs of the truck he drove, and did not pay dump fees. Apart from the invoicing and tax position, he was not obviously in business on his own account. He was not interested in doing work outside of the respondent and he had not previously worked as anything other than an employee.

[44] In conclusion, I am not convinced that Mr Bostock's tax position led him to enter into an independent contractor's arrangement with Mr Jenkins' company. Rather, I believe that the arrangements imposed by Mr Jenkins' company had led Mr Bostock (or rather his accountant) into setting up his tax position. Having questioned Mr Bostock, I am not at all convinced that he was working on his own account. He took on no financial risks at all in the arrangement. Therefore, I believe that this test indicates that Mr Bostock was not an independent contractor.

The overall picture

[45] Having reviewed the facts against the three tests, it is necessary to also look at the overall picture of the relationship and how it operated. As far as evidence from the respondent regarding industry practice was concerned, it was inconclusive, as it appears that some demolition companies employ their truck drivers and some treat them as contractors.

[46] The respondent made submissions comparing Mr Bostock with other drivers who were treated as contractors. Having heard the evidence of witnesses from both parties, at least two of the drivers (Mr Hillary and Mr Pittaway) chose to combine their work for the respondent with other jobs such as, for example, bus driving and being engaged in work for the film industry. In these particular cases, there was no obligation by those drivers to accept work from the respondent if they had already committed themselves to other work. Therefore, as these drivers could refuse an offer

of work from the respondent on any particular occasion, there was no mutuality of obligation between them and the respondent (sometimes called a wage-work bargain) which is the bedrock of an employment relationship and, in fact, any contractual relationship.

[47] However, it is the particular relationship between Mr Bostock and the respondent that the Authority must concentrate on, and I believe that Mr Bostock's situation can be distinguished from these other two drivers. Mr Hillary was clearly a casual worker for the respondent, who helped Mr Jenkins out as and when required, and who professed to not being interested in the money. He had many other interests and was not in any way wedded to the respondent company. Mr Pittaway on the other hand was an owner driver, who hired his truck to the respondent.

[48] Putting Messrs Hillary and Pittaway's situations aside, Mr Bostock said that he did not think he was different from other drivers, and the respondent certainly treated them as independent contractors. However, the Authority has not examined the circumstances of these other workers in detail, and I do not believe that it is helpful to compare Mr Bostock to their situations in that case.

[49] It is not clear whether Mr Bostock could have done other work if he had wanted to, and it is also not clear whether he could have refused work. These situations never arose. The overall picture is of a man who worked regularly, and largely fulltime for the respondent. Between November 2011 and July 2012 he worked for 27 weeks. He usually worked between eight and ten hours a day, and usually five days a week, save for a couple of weeks when he evidently took one or two day leave or when snow prevented him from working. He seems to have taken off three separate periods of two weeks leave during this period, including over the Christmas/New Year period when the company presumably had its annual shutdown.

[50] I am also very mindful of the inequality of bargaining between Mr Bostock and the respondent when he first started working for it. He was, in a word used by himself, *desperate* to work. Although he sought the advice of an accountant, this was without the benefit of any contractual documentation, and I believe, on balance, that the accountant would have been told simply that he was a contractor, without any further information. I am satisfied that Mr Bostock would not have voluntarily entered into an independent contractor's agreement had there been more of a level playing field between him and the respondent.

[51] Overall, Mr Bostock does not appear to be an independent contractor. His work patterns and the overall arrangement under which he worked is more akin to that of an employee in my view.

Determination

[52] The question of whether a worker is an employee or an independent contractor is often a finely balanced one. That can be seen from the case of *Bryson*, in which the Employment Relations Authority and the Court of Appeal found that Mr Bryson was an independent contractor, whereas the Employment Court and the Supreme Court found him to be an employee.

[53] Having applied the tests required in such a case, they largely prove to be inconclusive, or result in a finely balanced conclusion. On their face, many factors appear to point to an employment relationship, but when looked at in the light of the tasks to be undertaken, and the context of the demolition industry, actually could apply equally to an independent contractor relationship. Overall, despite the strongly expressed (but helpful) submissions of the representatives, I think the application of the tests results in a largely equally balanced situation between Mr Bostock being an employee and an independent contractor.

[54] However, it is the fundamental test and the overall picture that assist me most. Mr Bostock does not have many of the characteristics that one would expect of an independent contractor working on his own account. He came up to Christchurch from Oamaru somewhat desperate for work, and found that $25 an hour plus almost free accommodation an offer too good to refuse. He was not going to decline to engage with the respondent just because it wanted to call him an independent contractor. I do not believe that he even fully understood what the implications of such a choice were in terms of his rights.

[55] I should like to add that Mr Moore submitted that Mr Jenkins was operating a sham when he characterised Mr Bostock as a contractor. I do not share that view. I believe that Mr Jenkins acted in good faith, but was, not surprisingly, not fully au fait with his obligations and the complexities of employment law. The law concerning the status of workers is complex, and is often to be applied to a finely meshed factual matrix.

[56] In light of all the factors examined above, I conclude, on balance, that Mr Bostock was an employee of the respondent in law.

Direction

[57] The parties are directed to attend mediation in respect of the substantive claims lodged by Mr Bostock. Subject to the availability of a mediator, such mediation should take place within six weeks of the date of this determination. In the event that the mediation does not resolve all matters between the parties, Mr Bostock should advise the Authority, which would then convene a case management conference by telephone.

Costs

[58] Costs are reserved. The parties should attempt to agree between themselves as part of their mediation discussions how costs are to be dealt with. However, if they are unable to reach a settlement at mediation, the question of costs will be reserved until after the determination of the substantive matter.

David Appleton
Member of the Employment Relations Authority