

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 386
3117894

BETWEEN	QUENTIN RAUHIHI Applicant
AND	CONSTRUCTION LABOUR HIRE LIMITED First Respondent
AND	MULHOLLAND CONSTRUCTION LIMITED Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Kevin Smith, counsel for the Applicant
Paul McBride and Emma Rose Luxton, counsel for the Respondents

Investigation Meeting: 4 June 2021 at Wellington

Submissions Received: Orally and in writing on the day from both parties

Date of Determination: 3 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Quentin Rauhihi claims he was employed by Construction Labour Hire Limited ("CLH" or "the company") and was not an independent contractor as his contract with CLH purports. Mr Rauhihi seeks to have Mulholland Construction Limited (Mulholland Construction) joined as a party to the proceedings under the Employment Relations (Triangular Employment) Amendment Act 2019.

[2] CLH and Mulholland Construction say Mr Rauhihi was a labour-only contractor engaged by CLH. They say he was not subject to a triangular employment relationship and was not dismissed. They also say Mr Rauhihi has no valid claim against either company.

[3] If Mr Rauhihi is found to have been an employee, the Authority will investigate his claims, which include having been unjustifiably constructively dismissed, at a later date. If he is unsuccessful, his claims will be dismissed for lack of jurisdiction.

Identity of the first respondent

[4] Mr Rauhihi originally cited the first respondent as Construction Labour Hire Wellington Limited (Company number 2113015). That company, which was named as the Principal on the contract Mr Rauhihi signed, had been removed from the Companies Register before the commencement of Mr Rauhihi's employment.

[5] In the lead up to the Authority's investigation meeting to determine the preliminary issue of whether or not he was an employee, Mr Rauhihi sought leave to change the first respondent to Construction Labour Hire Limited (Company number 2395754). Leave for that change was granted without resistance from the sole director of both companies, Mr Paul Mulholland. Mr Mulholland is also the sole director of Mulholland Construction Limited.

Background

[6] Mr Rauhihi had recently completed his building apprenticeship when he entered into a contract with Construction Labour Hire Limited on 10 February 2020. The contract was headed "*Labour only contractor agreement for* (first respondent)".

[7] The contract referred throughout to Mr Rauhihi as "the Contractor". Amongst other provisions, it contained an acknowledgement by the parties that the real nature of their relationship was that of independent contractor and principal and that the contractor was in business on his own account.

[8] The contract made clear that Mr Rauhihi would perform assignments for third parties that were arranged by the company. The assignments would be determined by the company's requirements and would not constitute ongoing work.

[9] Other features of the contract were that:

- (a) Mr Rauhihi could accept an assignment or refuse it;
- (b) Remuneration at the agreed hourly rate would be paid on a weekly basis;
- (c) Mr Rauhihi was to present a timesheet on a weekly basis and could also issue an invoice to the company for payment;
- (d) CLH could generate a tax invoice on Mr Rauhihi's behalf if one was required for the purposes of being paid.
- (e) Withholding tax would be deducted from money paid to Mr Rauhihi at the required rate of 20 per cent;
- (f) Mr Rauhihi was to be responsible for his own liability for tax, ACC levies, and all other liabilities and expenses relating to him;
- (g) Mr Rauhihi was to supply all necessary tools and equipment for assignments, but CLH, or a client, could at their sole discretion from time to time supply him with tools or equipment.

[10] In addition to the contract, Mr Rauhihi signed a Commitment Declaration, and initialled a Drug and Alcohol policy document and a Health and Safety Policy document.

[11] The first assignment CLH offered to Mr Rauhihi, which he accepted, was on a residential construction site in Kapiti operated by Mulholland Construction (the Kapiti site). Mr Rauhihi and Ms Nalene Herridge, who was at that time Accounts and Operations Manager for CLH, signed the CLH contract on 10 February 2020 and Mr Rauhihi commenced work on the Kapiti site on 17 February 2020.

[12] That assignment lasted until 25 February following which Mr Rauhihi accepted an assignment on a Wellington site where he worked from 26 February up to, and including 23 March 2020. His work on the site was cut short by the country's move to Covid-19 Alert level 3 on that date.

[13] Following the Alert level 4 lockdown that commenced on 25 March 2020, Ms Herridge offered Mr Rauhihi further work on the Kapiti site, which he accepted, starting work on 28 April 2020. Mr Rauhihi continued working at that site until 11 May 2020.

[14] Mr Rauhihi was offered a further assignment in May 2020 which he declined.

The Authority's investigation

[15] Mr Rauhihi gave evidence in the Authority on his own behalf. Three witnesses gave evidence for the respondents: Mr Mulholland; Ms Herridge; and Stephen Cummings, who is the General Manager of McKee Fehl Constructors Ltd. Mr Cummings' evidence related to industry practice regarding labour hire and labour-only contractors.

[16] As permitted by s 174E of the Act, I have not set out in this determination all the evidence and submissions received from the parties although I have carefully considered all such information. Instead, I have stated relevant findings on facts and law; expressed conclusions on issues requiring determination to dispose of the matter; and made orders where necessary.

The law and its application to the relationship

[17] Section 6 of the Employment Relations Act 2000 (the Act) concerns the meaning of “employee” and provides at s 6(2) that:

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 decide the real nature of the relationship between them.

[18] In order to determine the real nature of the relationship, the court or 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.¹

[19] A leading case in determining the real nature of the relationship is the Supreme Court's judgment in *Bryson v Three Foot Six Limited (No. 2)*.² The Court held that “all relevant matters” included the written and oral terms of the contract between the parties as well as the way it operated in practice. The written intention of the parties was relevant, but not decisive, in determining the real nature of the relationship.

¹ S 6(3) of the Act.

² [2005] NZSC 34.

[20] To determine the real nature of the relationship the Court or Authority was required to “have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test)...”.³

[21] Since the *Bryson* judgment, and particularly in more recent years, there has been increased scrutiny applied to specific types of work where independent contracting arrangements are common. These include *Leota v Parcel Express Ltd*⁴, a case involving a courier, and *Barry v CI Builders Ltd*,⁵ involving a builder. Both Mr Leota and Mr Barry were found to have been employees after analyses of the real nature of their relationships with the companies that had purportedly engaged them as independent contractors.

[22] As referred to above, Mr Rauhihi seeks to join Mulholland Construction to the proceedings under the provisions of the Employment Relations (Triangular Employment) Amendment Act 2019. Those provisions came into force on 27 June 2020, after Mr Rauhihi had severed his relationship with CLH, and therefore do not apply to this matter. A similar situation arose in *Head v The Chief Executive of the Inland Revenue Department*, where a Full Court of the Employment Court found it proper to assess the employees' claims under s 6 of the Act.⁶

The intention of the parties

[23] There was no dispute between the parties that Mr Rauhihi had applied for a position advertised on *Trade Me* as a labour-only contractor. He emailed Ms Herridge to express his interest and then met her in a shopping plaza where they had what he referred to as "a cursory review" of the CLH contract.

[24] During their interview, which Mr Rauhihi said lasted 15 to 20 minutes, he recalled Ms Herridge telling him he would not be entitled to any sick leave or holiday pay. His evidence is that this did not mean much to him as he was not familiar with the terminology of employment contracts and had worked only as an employee for one employer since completing his apprenticeship.

³ N2 at [32].

⁴ *Leota v Parcel Express Ltd* [2020] NZEmpC 61.

⁵ *Barry v CI Builders Ltd* [2021] NZEmpC 82.

⁶ *Head v Chief Executive of the Inland Revenue Department* [2020] NZEmpC 155 at [60].

[25] Mr Rauhihi said in written evidence that he considered Ms Herridge had:

taken advantage of my business naivety as a newly qualified apprentice and bamboozled me with technicalities, tax law and legalities that I did not have the background to comprehend which she must have known.

[26] Mr Rauhihi recalled Ms Herridge telling him he would be paid \$35 per hour. In the event, the rate was confirmed at \$33 per hour, which Mr Rauhihi acknowledged in the course of the Authority's investigation meeting was considerably higher than a newly qualified builder could have expected to earn as an employee. He also acknowledged that he understood the rate was higher because it recognised that, as a contractor, he would not be paid for any time off work for sickness or holidays.

[27] Ms Herridge's recollection was that their meeting took approximately 45 minutes during which she explained key points of the contract in detail, checking that Mr Rauhihi understood them. She recalled that Mr Rauhihi asked a number of questions and demonstrated by those questions that he grasped the concept of being an independent contractor and essentially working for himself, rather than being an employee.

[28] It was Ms Herridge's evidence that she was very clear with Mr Rauhihi that he would be paid only for the hours and days he chose to work. She said he indicated his understanding of that and was excited by the prospect of being able to claim back his expenses at the end of each tax year if he kept all his receipts.

[29] Ms Herridge also said she told Mr Rauhihi he should take advice about becoming a contractor and the issues that entailed. She said his response was that he would talk with some mates of his who were contractors. Mr Rauhihi denied having any mates who were contractors but did not deny Ms Herridge had recommended that he take advice about becoming a contractor.

[30] The manner in which Mr Rauhihi gave evidence in the investigation meeting supported Ms Herridge's view of his being an intelligent young man who had quickly grasped the concept of the self-employed contractor role under discussion with him. I gathered from his oral evidence that Mr Rauhihi came away from his meeting with Ms Herridge knowing he would be self-employed and that many of his expenses would be tax deductible. He understood that

he would be paid only for the days and times he worked, and that he would be offered work which he could accept or reject as he chose.

[31] I prefer Ms Herridge's evidence concerning the length and extent of the interview she conducted with Mr Rauhihi. Her memory of dates and times, and of the process she had gone through with Mr Rauhihi, and his responses, was clearer than Mr Rauhihi's recollection. For example, in his oral evidence Mr Rauhihi contradicted his written evidence over the date of the interview with Ms Herridge. There is no suggestion that Mr Rauhihi deliberately gave incorrect dates but I infer, both from that example and from other dates on which his recollection was vague or incorrect,⁷ that his accuracy about the timing of past events was not as precise as Ms Herridge's.

[32] I accept Ms Herridge's evidence that she was diligent about ensuring interviewees clearly understood the nature of the contract CLH was offering them. Her evidence about the process she followed with interviewees was compelling. I consider her recollection of the length of the interview with Mr Rauhihi, and the time she spent ensuring he was comfortable with the contract, is likely to be accurate. Her evidence, which I accept, is that she followed up her interview with a phone call to Mr Rauhihi a few days later to ensure he was happy with the contract and to answer any further questions he may have.

[33] I also accept she recommended that he take his own advice on becoming a contractor and what that entailed. While Mr Rauhihi did not have a great deal of experience to draw on, I do not accept his view that Ms Herridge took advantage of his business naivety. It is relevant that, directly above the signature portion of the contract Mr Rauhihi signed, approximately two weeks after the interview, there was a declaration in bold type to the effect that he had been given the opportunity to seek independent advice and had read and understood the conditions contained in the contract.

[34] His situation can be distinguished from that of Ms Tulai and Mr Prasad who were found by a Full Court of the Employment Court to be in a vulnerable position as immigrants whose first language was not English.⁸ They had signed confusing documents, purporting to be Contractor Agreements, with a labour hire company, without receiving explanations of the documents' contents or proper opportunity to take advice. The Court found both to have been

⁷ Such as referencing the first Covid-19 lockdown as commencing on 13 March 2020 instead of 25 March 2020.

⁸ *Prasad v LSG Sky Chefs New Zealand Limited* [2017 NZEmpC 150].

employees of LSG Sky Chefs New Zealand Ltd, after analysis of the real nature of their relationships.

[35] I am satisfied Mr Rauhihi clearly understood at the time of his interview with Ms Herridge, and when he subsequently signed the labour-only contract with CLH, that he would not be an employee. The parties' mutual intention at that point was that he would be a self-employed independent contractor.

[36] That is one indication of the relationship between the parties but, as noted above, it is not determinative. How the parties labelled their relationship, or intended it to operate, is only one consideration and other factors need to be examined to determine its "*real*" nature. I will now consider those factors, starting with what control was exercised over Mr Rauhihi's work.

Control

Choice of work

[37] Mr Rauhihi acknowledged that Ms Herridge, who remained his contact person in CLH, sourced work for him which he was free to either accept or reject. He agreed that, after he had completed his first assignment, working for approximately one week on the Kapiti site, Ms Herridge asked him if he had a preference for the location of his next job. Mr Rauhihi expressed his preference for working in Wellington rather than Kapiti. He chose one of the available assignments, which was on a commercial site in Thorndon operated by an unrelated construction company.

[38] Mr Rauhihi confirmed that in May 2020 he rejected a job Ms Herridge offered him. She had advised him to take wet weather gear as rain had been forecast for what would have been his first day on the job. Mr Rauhihi declined the work because he did not wish to work in the rain.

[39] It is clear that Mr Rauhihi had the freedom to accept or reject work as he saw fit, and to have his preferences regarding location considered when work was offered to him. This flexibility is indicative of a contracting relationship rather than one of employment.

On assignments

[40] Mr Rauhihi said that, once he had accepted an assignment, he had no control over the hours he worked: he was told the time he had to start work and when he could finish. He was

required to remain on the assignment until it was completed or until CLH told him to leave. When he occasionally took a day off work, he had to ask the site foreman before doing so.

[41] The site manager or foreman would tell Mr Rauhihi what work needed to be done. He said he followed the foreman's process and was unsure whether he could do the work the way he wanted if that differed from the foreman's method.

[42] Ms Herridge's evidence was that, once Mr Rauhihi had accepted an assignment, she would advise him of the time he was to report for work on the first day and would meet him on the site to introduce him to the foreman and ensure he had the appropriate site induction. She said she had noticed Mr Rauhihi worked variable hours, some days between one and four hours per day. On occasion he finished work after the foreman had left the site, which was not something an employee would do. Ms Herridge said she did not know when Mr Rauhihi was going to take time off work: he did not ask her and she did not expect him to do so.

[43] It seems from Mr Rauhihi's evidence that once he started an assignment, any control over his work was exercised by the site manager or foreman. On the Thorndon commercial site, where Mr Rauhihi spent the longest time working, the foreman was either employed or engaged by the company operating the site. That company was unrelated to the respondent companies, neither of which exercised control over its operations.

[44] On the Kapiti site it was the site manager who, according to Mr Mulholland, was an independent contractor, who had that function. Mr Mulholland's evidence was that every construction site has someone running the overall project. I accept that is likely to be so and that it is a function of that person to ensure the project runs efficiently, safely and to time.

[45] Mr Rauhihi's lack of experience in the construction industry makes it difficult to assess his claim over the level of control of his work onsite. No site manager or foreman was called to give evidence and Mr Rauhihi's own evidence suggested he was uncertain whether he could perform a task his way or whether he had to follow the site manager's lead.

[46] He took the latter approach, without testing what autonomy he had in undertaking the work. Given that he had only recently completed his apprenticeship, and given the relatively short period of time he spent on each work assignment he accepted, his reticence in that regard could be seen as a reasonable course of action for someone still in the process of learning how

construction sites operated. I do not regard his acceptance of the site manager's processes as evidence of control by the company he claims to have been his employer.

[47] Nor do I regard Mr Rauhihi's evidence of checking with the site foreman or manager if he could take time off work as indicating detailed control. It seems reasonable that any person working on a construction site, whether as employee or contractor, would be required to check in advance with site manager that their absence will not cause undue disruption to the scheduled flow of the operation. I note that Mr Rauhihi did not claim he had to seek permission from CLH when he wished to take time off work. He did not dispute Ms Herridge's evidence that he did not do so, and that she had no expectation that he would.

[48] Mr Rauhihi's working relationship with CLH took place over a period of approximately three and a half months, for one month of which there was no work due to the first national Covid-19 lockdown. The brevity of the relationship, and of each assignment Mr Rauhihi undertook makes it difficult to discern any patterns that strongly indicate the nature of the relationship. However, taking all of the above factors into account, I do not accept that CLH, or Mulholland Construction, exercised the type of detailed control over the work he performed while on assignments that would indicate the relationship to be one of employment.

Integration

[49] In *Barry v CI Builders Limited* the Court stated:

This part of the inquiry is focussed on whether the person is part and parcel of, or integrated into, the work operation of the putative employer. The integration test is not, however, solely concerned with the nature of the work being performed. Factors such as the duration of the work (for example, if the role is fixed term or temporary), training and reporting requirements, and the practical operation of the business relationship agreed to by the parties may also be relevant.⁹

[50] It was Mr Rauhihi's evidence that, from his first day on the job at the Kapiti site and throughout his time undertaking assignments offered to him by CLH, he regarded himself as an employee. He said on each construction site he worked alongside "other employees" and felt "fully integrated into the business of the respondents". His comments were not restricted to the Kapiti site, but included the Thorndon site operated by an unrelated construction company.

⁹ N5 at [31].

[51] I understood from Mr Rauhihi that he did not discern any difference between his situation and that of the other trades persons working on the site. Mr Rauhihi acknowledged in oral evidence that he did not know whether the people he was working with were employees or contractors.

[52] It was Mr Mulholland's evidence that most, if not all, of the trades persons on the Kapiti site where Mr Rauhihi initially worked were self-employed contractors like Mr Rauhihi. As already noted, this included the site manager.

[53] Mr Mulholland said Mulholland Construction did not normally employ any trades staff: if and when it employed anyone, it was to undertake administrative work. The exception would be if the company had foreign workers whose visas precluded them from being taken on as contractors. I understood from his evidence that Mulholland Construction engaged trades staff mainly, but not exclusively, through CLH.

[54] CLH had been set up by Mr Mulholland to provide a pool of contractor trades people who were available to the construction sector for particular projects. I took it from Mr Mulholland's evidence that the peaks and troughs in that sector, and the high demand for specific trades at times throughout a construction project required the flexibility that independent contracting arrangements offered. His evidence was that such arrangements suited many trades people who were attracted to the benefits of being self-employed and being able to work on multiple projects while also receiving higher rates of pay than they would be offered if they were employees.

[55] Mr Rauhihi claims to have been employed by CLH and integrated into its business and, as he referred to "respondents", into the business of Mulholland Construction. It was not clear how he regarded himself as integrated into the business of either of those companies when working on a site unrelated to them as, for example, the Thorndon site.

[56] One factor Mr Rauhihi cited as indicating that he was integrated into CLH's business was that he was required to wear a uniform, comprising a hard hat and a shirt, bearing the logo of the respondents, when working on construction sites.

[57] Mr Mulholland denied that CLH had a uniform or that it required any contractor to wear one. It was his evidence that Mulholland Construction did not have a uniform either, but it did have some branded clothing, such as tee shirts, for promotional purposes which was

available to employees. Mr Mulholland said it was not compulsory for contractors to wear them and some chose not to.

[58] Under questioning, Mr Rauhihi acknowledged that, when Ms Herridge gave him a tee-shirt, he had made an assumption he should wear it. He said she had not told him he was required to do so.

[59] With regard to hard hats, it was Mr Mulholland's evidence that they were not normally required on residential construction sites unless work was being undertaken above a worker, or if the site manager stipulated workers had to wear them. It was different on larger commercial sites where a crane might be operating. In that situation every person on site would be required to wear a hard hat and a high-viz vest.

[60] Mr Mulholland said if contractors arrived on site without the personal protection equipment (PPE) they were expected to bring, it was more efficient to provide them with that equipment in order not to delay progress on the construction project. He acknowledged Mulholland Construction had branded hard hats and high-viz vests that were available on the Kapiti site if the site manager required them to be worn or if a contractor felt it necessary to wear them.

[61] I do not accept there was a requirement for Mr Rauhihi to wear a uniform. He was given one tee shirt, with no instruction that he had to wear it. I do not consider that the branding on any clothing or equipment he did not provide himself constituted a uniform.

[62] I find little to support Mr Rauhihi's claim to be fully integrated into the business of CLH or Mulholland Construction. He was offered assignments by CLH but could accept or reject them as he saw fit. He did not report to Ms Herridge, who was his contact person in CLH, and her role was to source assignments for Mr Rauhihi from various construction projects in the wider Wellington area.

[63] With regard to reporting arrangements, the only people Mr Rauhihi could be said to report to were the site managers or foremen of the construction sites on which he accepted assignments. One of those site managers was on the Kapiti site operated by Mulholland Construction. There was no evidence to indicate that Mr Rauhihi's relationship with that site manager was of a different nature from his relationship with the site manager on the Thorndon site operated by an unrelated business.

[64] I do not consider Mr Rauhihi was integrated into CLH's or Mulholland Construction's organisation. He had a relationship with the former company under which it could offer him work which he was free to accept or reject. His relationship with the latter company was as a result of his accepting two offered assignments, the first of which lasted for eight days; while the intended duration of the second is unknown, but was terminated by Mr Rauhihi after less than two weeks.

[65] I will briefly consider three other factors referred to by Mr Rauhihi as supporting his contention that his relationship was one of employment rather than independent contracting. The first of these is time recording. Mr Rauhihi claimed he did not complete timesheets or undertake any kind of time recording in the assignments he undertook.

[66] In disputing that claim, Mr Mulholland said Mr Rauhihi could not have been paid unless he had, along with all other contractors, signed in and out of each site. He said those recorded hours formed the basis for charging clients and paying contractors. Under questioning, Mr Rauhihi recalled that he may have signed in while working in his final weeks at the Kapiti site which he returned to post-lockdown.

[67] I find Mr Rauhihi's recollection of not recording the times he worked is likely to be mistaken. Although he conceded orally that he recalled recording his times only in his last week or two of work on the Kapiti site, I consider it more likely he signed in and out of sites on each of the assignments he undertook and I prefer Mr Mulholland's evidence on this point although I do not regard it as a strong indicator of a contracting or an employment relationship.

[68] The next matter Mr Rauhihi referred to was that he supplied his own transport and his own basic equipment such as hand tools, skill saw and battery tools. He said he had also supplied those pieces of equipment in his previous situation as an employee. When larger equipment was required, CLH supplied it. Mr Rauhihi did not specify what equipment was provided to him.

[69] Ms Herridge said she would always ensure contractors had the necessary PPE required on each site, if the contractor did not have their own. She would also ensure they had the appropriate site induction when taking up an assignment on a new site. It was Mr Mulholland's evidence that the operator of a construction site would sometimes provide additional specialised or expensive pieces of equipment for contractors to use. This was done in order to

keep projects tracking along efficiently if contractors did not have their own specialised equipment or enough of their own safety equipment.

[70] Again, I do not consider these factors to be strongly indicative of a particular type of relationship.

[71] The third factor Mr Rauhihi raised was the method of his payment; tax; and the Covid-19 payments he received during lockdown all of which he considered supported his claim to have been an employee.

[72] Mr Rauhihi was paid on a weekly basis and tax was deducted from his remuneration at the IRD specified rate. It was Mr Mulholland's evidence that CLH followed standard practice in the construction industry in paying Mr Rauhihi's for his work that way rather than waiting for the job to be completed before paying him. He considered this to be in accordance with the Construction Contracts Act 2006 and said it reduced the risk to contractors. Mr Rauhihi had completed the tax form relevant to a labour-only contractor in the building industry.

[73] Over the Covid-19 Alert level 4 lockdown period Mr Rauhihi received payment, which he claimed was an employee Covid-19 payment that CLH had applied for on his behalf. Ms Herridge and Mr Mulholland both denied that CLH had applied for any payment on his behalf, and said none had gone through the company's books.

[74] From the amount Mr Rauhihi said he had received, Mr Mulholland said he assumed Mr Rauhihi had been paid the contractor Covid-19 payment. Ms Herridge said she had contacted all the CLH contractors during lockdown to ensure they had applied for that payment. She recalled Mr Rauhihi informing her that he had received it.

[75] There was little evidence to support either party's assertions but, as I have previously noted, I have found Ms Herridge to be more accurate in her recollection of events than Mr Rauhihi. Accordingly I am inclined to accept her evidence over the matter of the Covid-19 payment.

[76] The payment on a weekly basis of wages to Mr Rauhihi, rather than payment on conclusion of an assignment, could be seen as indicating a relationship of employment but is not determinative. Taxation arrangements also fall in that category. Mr Rauhihi's remuneration had tax deducted in accordance with Schedule 4, Part E of the Income Tax Act 2007. That part

of the statute provides for a standard rate of tax to be imposed on schedular payments for "labour-only building work".

[77] These three additional factors cited by Mr Rauhihi give mixed results which, overall, do not strongly indicate one type of relationship over the other.

Industry Practice

[78] Mr Cummings who gave evidence regarding industry practice, has been in the construction industry for over 30 years and is currently General Manager of a large and well-known Wellington commercial construction company. He is a Quantity Surveyor and has worked for both large and smaller construction firms in New Zealand throughout his career.

[79] It was Mr Cumming's evidence that the constant ebb and flow in the construction industry makes it untenable to employ all permanent staff and he says the industry could not continue without labour-hire or labour-only contractors. The reason for this is that the timing of construction projects and the labour and labour expertise required for them is always variable. Different skill sets are required at different times in different parts of a project and there is no ongoing requirement for particular skills on completion of the various components of that project.

[80] I understood from Mr Cummings' evidence that, for a company to maintain a permanent complement of employees with all the skills required to undertake a construction project when those employees would be required to undertake only sporadic bursts of activity would be financially unsustainable. In the company he heads, the work force would have to swell from the low hundreds into the thousands if it were required to employ staff to cover all the skill sets required for the completion of a construction project.

[81] Mr Cummings also gave evidence about the role of site managers who are responsible for ensuring the specific requirements of the particular construction site are met. They work to set programmes, and are responsible for delivering to quality standards and meeting health and safety and timeline objectives for the site.

[82] Mr Cummings said that labour-hire and labour-only contractors report to the site manager to carry out the specific work they have been contracted to perform. The site manager wields a significant amount of control to ensure that the different components of the construction project are performed at the right time and in the right order.

[83] While industry practice is not a determinative factor, it is one more piece of evidence to be considered in an assessment of the true nature of a relationship, however labelled.

Fundamental or economic reality test

[84] The essential question here is whether Mr Rauhihi was in business on his own account. The evidence is mixed and the relationship was of such short duration that assessment is difficult.

[85] The strongest factors that indicate Mr Rauhihi was not in business on his own account are that he could not substitute a subcontractor for himself in any assignment, unless he had CLH's permission to do so; he did not stand to make a profit from any of the assignments he accepted; and he did not accrue any business goodwill.

[86] During the short time Mr Rauhihi had a contractual relationship with CLH there is no evidence that he sought to substitute a subcontractor for himself at any stage, which gives me no means of assessing how likely CLH was to agree to such a substitution.

[87] The strongest factors that Mr Rauhihi was in business on his own account are that he could choose which of the assignments offered to him that he wished to accept; he could accept work from other sources; and he had the freedom to take time off work, without checking with CLH.

[88] After weighing up all the evidence of the parties I consider that Mr Rauhihi was attracted to the idea of self-employment at his interview with CLH because of the benefits that way of working offered him. He embraced the concept and enjoyed the flexibility to choose the assignments he would work on and the higher remuneration he received for being a contractor. He took advantage of being able to take time off work when it suited him.

[89] On balance I find that he intended to be, and was, in business on his own account.

Conclusion

[90] I am satisfied that the parties mutually intended when entering into a relationship in February 2020 that it would be one where Mr Rauhihi was an independent contractor. After examining the factors of control, integration and the fundamental test, I consider that, despite there being some mixed indications, the relationship worked in reality as it was intended to by

the parties. While I consider the evidence regarding industry practice to be informative, it has not played a role in the conclusion I have reached.

[91] I have concluded that Mr Rauhihi was an independent contractor and not an employee of CLH as he claimed, or of Mulholland Construction. That being so, Mr Rauhihi is not able to pursue a personal grievance and I have no jurisdiction to consider his claims further.

Costs

[92] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority