

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 428
3109694

BETWEEN	MICHAEL SENTY Applicant
AND	S & J PROPERTY MAINTENANCE LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Kelly Coley, advocate and Jasmine Tso, counsel for the Applicant Steph Dyhrberg and Aleisha McNatty, counsel for the Respondent
Investigation Meeting:	28 April 2021 at Palmerston North
Supplementary submissions	26 July 2021
Determination:	4 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Senty claims he was employed by S & J Property Maintenance Limited (S & J Property) and was not a contractor. Steve Byron (Mr Byron) and Justine Byron (Ms Byron) are the shareholders and directors of S & J Property and they say Mr Senty was engaged as a contractor.

[2] As an employee, Mr Senty says he is entitled to payment for outstanding statutory entitlements including annual leave, sick leave and statutory holidays and payment of Kiwisaver contributions.

The Authority's investigation

[3] For the Authority's investigation written witness statements were filed from Mr Senty, Jean Richards (Mr Senty's partner), Mr Bryon, Ms Byron and James Underhill (a contractor at S & J Property). All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions. In light of a recent Employment Court case, *Barry v CIB Builders*¹ both parties filed further submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received but given that this issue is intensely fact specific, the evidence has been summarised because there were a number of conflicts in the evidence.

[5] The issue requiring investigation and determination is whether Mr Senty was an employee or a contractor over a period of approximately 40 weeks from 27 November 2018 to 9 October 2019. If Mr Senty was an employee he will be entitled to all the rights and remedies available to employees under the Employment Relations Act 2000 (ER Act) including payment of statutory entitlements and KiwiSaver contributions. If he was an independent contractor then he has no rights under the ER Act.

Background

[6] S & J Property is a small family owned company operating a property maintenance business specialising in commercial and residential fencing. Fencing is mostly outside work and jobs could fluctuate or be put off for various reasons including weather and the amount of work available.

¹ *Barry v CIB Builders* [2020] NZEmpC 82.

[7] S & J Property only engages contractors because the business requires the flexibility this provides, however the Byron's son, Corban, was an employee and is now doing an apprenticeship.

[8] Mr Byron on behalf of S & J Property sources and secures the fencing and maintenance work for clients of S & J Property. He then allocates the jobs and tasks and also organises materials, gives instructions to the contractors as and when necessary and checks the contractors work at the end of a job.

[9] In mid-November 2018, Mr Senty was looking for work and was put in touch with Mr Byron. On or about 22 November 2018 they met at the Mobil petrol station in Foxton to discuss the possibility of work. On the same day, after a work site visit and discussions between them, it was agreed Mr Senty would start with S & J Property.

[10] In evidence Mr Byron was clear that he told Mr Senty that he was to be engaged as a contractor. Mr Senty's evidence was equally clear that he understood he was to be an employee, although he did note that Mr Byron told him he would not be paid sick leave or holiday pay. At that time Mr Byron intended for there to be a more detailed discussion with Mr Senty involving Ms Byron about working for S & J Property and made arrangements for that to occur at the Byron's house. The Byron's home was also the work base for S & J Property.

[11] The hourly rate was to be \$25.00 per hour and Mr Senty started approximately a week later on or about 27 November 2018. There was no written employment agreement or work contract. There is a conflict in the evidence about whether there was a specific meeting at the Byron's house to discuss the details that necessarily would have included discussion about contracting because Ms Byron had developed systems to help the contractors who she had found to have struggled in the past with their business administration.

[12] The Byron's say this meeting took place on or about 26 November 2018 evidenced by a text message sent a day or so earlier with the address. Mr Byron stated the following:

“At this meeting Justine explained to Michael that if we were going to hire him, it would be as an independent contractor, and that he wouldn't receive employment

entitlements like sick pay or holiday pay. She told him withholding tax would be deducted from his earnings (as he has acknowledged), and he would have to file an annual tax return with Inland Revenue.”

[13] Mr Senty does not recall that specific meeting and submissions were made that he was already “employed” after the first meeting with Mr Byron and that on 22 November 2018 Mr Senty accepted an offer of employment by texting his details to Mr Byron and this pre-dated any detailed conversation about contracting with Ms Byron.

[14] The parties were both unclear on the exact start date although the IRD form (IR330C) was dated 27 November 2018. Mr Byron sent a text message with his home address to Mr Senty on Sunday 25 November 2018 and from further text messages it appears that Mr Senty went to the Byron’s house at 8:00am on 28 November but it is not clear whether that was to start work that day and/or to meet to discuss the arrangement between them or both.

[15] In any event, Mr Senty commenced duties with S & J Property and sometime after 5 December 2018, Mr Senty signed an IR330C form which is titled “Tax rate notification for contractors” that Ms Byron handed him to sign. She had pre-populated and back-dated the form to 27 November 2018. Mr Senty gave evidence that he had the document fleetingly, he knew it was for tax but he did not recall signing it although accepts that he did.

[16] Most of the time Mr Senty worked with others but occasionally he would work alone. Mr Byron did not work on site with Mr Senty very often. Mr Senty’s work day started either at the Byron’s house in the mornings or at a work site based on text messages or communications from Mr Byron. There were a varying number of contractors over the time Mr Senty was engaged by S & J Property ranging from one other when he first started to up to six others when the work increased, including James Underhill who was engaged during the last month or so that Mr Senty was working.

[17] The invoices and timesheets available show the work pattern being that Mr Senty worked regularly Monday to Friday other than when he had days off or when it rained.

[18] Mr Senty had significant time away from work, particularly in the last three months. This was due to either his own health, family court or family related

commitments. Overall he worked for S & J Property for approximately 40 weeks with around 40 unpaid days off. Mr Senty says he averaged approximately 35 hours per week and it was agreed that the majority of his time off was towards the end and coincided with the onset of a back injury.

[19] Mr Senty was paid by S & J Property based on his handwritten record of hours worked and recorded on the forms provided to him by Ms Byron that were called daily timesheets. Ms Byron then created invoices on behalf of Mr Senty from Mr Senty's recorded hours enabling the company to make payments to Mr Senty as a contractor. These payments were less child support and withholding tax. In accordance with the systems set up, the invoices were retained by S & J Property and copies were not given to Mr Senty although Mr Senty was told at the initial meeting with Ms Byron that he was able to access them on request (because she would have known that he would need them for tax purposes). Mr Senty does not recall this. Text messages were sent at times to say "wages" had been paid.

[20] It was accepted by both the parties that they had a good relationship. The Byron's were happy with Mr Senty and his work, and Mr Senty enjoyed working for them. Mr Byron increased Mr Senty's hourly rate to \$26.00 in March 2019 and to \$27.00 in August 2019 to recognise his time and hard work with the company. Mr Senty was paid at least one bonus for hard work and reward and there was conflicting evidence regarding whether a second bonus was intended but ultimately was not paid.

[21] In July 2019, Mr Senty's health issue got worse and he did not work for two consecutive weeks from 29 July to 11 August 2019. Mr Senty asked for and was advanced a \$500 loan from the company to help him out during this time. It was to be paid back by way of a job that Mr Senty could do but the job never eventuated so it was agreed the loan would be paid back at \$50.00 per week.

[22] In October 2019, S & J Property stopped offering Mr Senty work because he was unavailable due to his health issue. Sometime later Mr Senty telephoned Mr Byron requesting information for ACC, in particular, pay slips. Mr Byron told Mr Senty there were no pay slips because Mr Senty was a contractor and not an employee of S & J Property. Mr Senty says this is the point when he realised he was considered by S & J Property to be a contractor and not an employee.

Submissions

[23] Ms Coley highlighted Mr Senty's evidence, that he had never been in business for himself, does not know how to set up or operate a company and was unaware of how a contracting arrangement worked in practice or how it differed from that of an employee.

[24] Ms Coley's submission was that with no written agreement, intentions must be viewed at the time the offer was made to the Mr Senty. Mr Byron left administration to Ms Byron, which included discussions with new workers and accepted under cross examination that he was not present at all of the meeting at the house with Mr Senty. Ms Coley further submits that Mr Senty, in fact, accepted an offer of employment on or around 22 November 2018 after the meeting at the Mobil petrol station and as a detailed discussion had not occurred with Ms Byron at this stage, Mr Senty was correct in thinking he was to be an employee and his text message on 22 November 2018 was acceptance of an offer of employment.

[25] With reference to the relevant case law, Ms Coley submits that analysis of the control test shows the company exercised a high degree of control over the applicant evidenced by a number of factors, including filling in time sheets, directing the day to day work and provision of a work van with signage, including the company name and Mr Senty's name. The company also chose the hourly rate and decided when to increase that rate and paid a bonus to Mr Senty.

[26] Ms Coley further submits Mr Senty had no ability to subcontract work or hire other workers, he was designated as a foreman on at least one occasion and he never turned down work. She accepts that he did not work on numerous occasions due to either family commitments or a health issue but says this is explained by Mr Senty's evidence.

[27] She submits that the totality of the evidence demonstrates Mr Senty did not run a business of his own and he was solely in the business of S & J Property. He exercised no real autonomy over his work and was integrated into the business to a significant degree.

[28] Ms Dyhrberg submitted on behalf of S & J Property that there was common intention between the parties that it be a contracting arrangement. S & J Property offered Mr Senty work from the end of 2018 until October 2019 when he could no longer work because of his back problems. She noted that Mr Senty signed the tax rate notification for contractors a few weeks after starting work and Mr Senty could always turn work down and he never worked full time. There were over 40 days when he did not work and all of this points to Mr Senty knowingly and intentionally being engaged as an independent contractor.

[29] Prior to Mr Senty encountering issues with ACC compensation when he was unable to work, he had never raised any issue (except to James Underhill) about the way he was paid, or the fact he did not receive holiday or sick leave. Ms Dyhrberg submits it suited Mr Senty's purposes to be an independent contractor at the time and he has only sought to change his status belatedly because of ACC and tax issues.

[30] Ms Dyhrberg submits that it is significant that S & J Property has never engaged any employees. She submits Mr Senty was engaged pursuant to a verbal contract for services with the intention of the parties clear from the outset and the nature of the relationship did not change during the applicant's engagement. Mr Senty exercised control and flexibility over his hours and was not an integral part of the Respondent's business.

Supplementary submissions

[31] Supplementary submissions were filed by Ms Dyhrberg on 27 July 2021 helpfully bringing a recent Employment Court case, *Barry v CIB Builders*, to the Authority's attention. Ms Dyhrberg notes that *Barry v CIB Builders* appears to be relevant but submits the facts make it distinguishable from this current matter.

[32] The differences include that Mr Barry had greater vulnerability and therefore the power imbalance in *Barry v CIB Builders* was greater. Mr Barry worked on average at least 40 hours per week over a continuous three year period whereas Mr Senty worked for a much shorter period of time with significant time off.

[33] Mr Barry also did not perform work for others, whereas it is submitted there were at least two occasions Mr Senty undertook work for others and on the whole worked independently.

[34] Ms Coley also filed supplementary submissions where she submitted that the *Barry v CIB Builders* was both relevant and analogous to Mr Senty's case and the similarities far outweigh the differences. She notes the useful analysis of industry standard and practice, in particular that it was common for construction workers to have a small selection of personal tools that they used in conjunction with the employer's tools and equipment.

[35] Many of the similarities or differences highlighted by the parties in *Barry v CIB Builders* are matters that are considered in the test that must be applied when determining the true nature the relationship and as such will be considered in the analysis below.

Legal framework

[36] An employee is defined in s 6 of the ER Act as someone who is employed by an employer to do any work for hire or reward under a contract of service. In determining whether a person is an employee or a contractor, the Authority must determine the real nature of the relationship between the parties and in doing so must "consider all relevant matters" and this includes any matters that indicate the intention of the parties, however, a person's statement about status is not determinative.

[37] The leading case on determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd (No 2)*.² In *Bryson* the Court defined "all relevant matters" as:

[32] "All relevant matters" certainly 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. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice.

² *Bryson v Three Foot Six Ltd* [2005] NZSC 34.

It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person had been effectively working on his or her own account. (the fundamental test), which were important determinants of the relationship at common law....”

[38] Therefore “all relevant matters” includes consideration of the well traversed common law tests of control, integration and the fundamental economic test as well as any written or oral terms of the contract between the parties and the way it operated in practice.

[39] In *Leota v Parcel Express* the Court held that these cases are “intensely factual” and must be determined accordingly and described the issue as follows:³

[30] An employee works for an employer, within employer’s business, to enable the employer’s interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[40] Put another way an independent contractor is seen as autonomous, arranging their own remuneration, holidays and other conditions. Employees on the other hand lack that autonomy and work for pay or wages.⁴

[41] In *Barry v C I Builders Limited*,⁵ there was no dispute from the outset that Mr Barry was engaged as a contractor, however, the Court ultimately found that Mr Barry was not a contractor and was employed under a contract of service. Regardless of the label ascribed to Mr Barry at the start, the Court reached the conclusion that the real nature of the relationship between them was one of employment and commented about the relative weight that ought to be ascribed to intention.

³ *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [30].

⁴ Gordon Anderson *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at 72.

⁵ *Ross Barry v C I Builders Limited* above n1.

[42] CI Builders dealt with client relations and enquiries and, as noted, to an external observer such as a client, Mr Barry would not be differentiable from the CIB business. Any goodwill generated by Mr Barry's skill, labour or work ethic accrued to CIB. This factor points towards the real nature of the relationship being one of employment. The analysis was explained "*Boiled down to its essentials, the key question is: was Mr Barry serving his own business or CIB's business.*" The Court found that there was no business to which Mr Barry could accrue any intangible benefit.

[43] It has long been established that application of the tests to determine the whether a person is a contractor or an employee, requires the Authority to consider, broadly and realistically rather than narrowly and artificially or legalistically, the real nature of the commercial relationship between the parties.⁶

The intention of the parties

[44] There is a dispute in the evidence as to the parties' intentions. Mr Senty's evidence was had he known he was to be a contractor it was unlikely he would have accepted the offer and the Byron's say they due to the nature of their business they would never have offered Mr Senty a position as an employee because S & J Property only engage contractors.

[45] Mr Byron gave evidence that although he did not recall the exact words used, he definitely told Mr Senty it was an independent contracting arrangement that was being discussed at their first meeting. Ms Byron gave evidence that she covered the contracting arrangements in more depth at a meeting at their house and including specific things that Mr Senty needed to know such as no paid leave, withholding tax and the invoicing system she created to help contractors with their administration.

[46] S & J Property both created invoices (on behalf of the contractors) and paid Mr Senty on the basis of those invoice. Although both parties talk and text about Mr Senty's wages, Mr Byron gave evidence that in his experience "wages" was a common phrase that could mean either wages (contract of service) or payment in accordance with a contract for service. Mr Senty on the other hand says he thought that wages meant wages.

⁶ *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 at [9].

[47] Mr Senty's evidence was that he has never worked as a contractor, did not know how to run a contracting business and did not realise the significance of no paid sick leave or annual leave in terms of that signalling the difference between being a contractor or an employee. Mr Senty recalled being told he would not be paid for sick days or annual leave and while he thought it was strange, he accepted that was how the Byron's ran their business and did not question it because he was desperate for work. In addition, he says it is not in his nature to ask questions out of "respect for bosses". His statement records:

"I do recall that I was told I would not be paid sick days or annual leave. I did think this was strange, but I was so excited about earning an income that I did not raise any issues as I was scared this might rock the boat and I would lose my job. My partner Jean did also tell me this wasn't right."

[48] While Mr Senty recalled tax being mentioned, he did not recall being told he had to pay his own tax. He did recall hearing that S & J Property would pay tax for him and told Ms Byron that the tax code that applied to him was "MSL". Ms Byron accepted that she heard Mr Senty talk about his tax code but said that she discussed withholding tax being paid for him by S & J Property.

[49] The parties differing understanding regarding the nature of the relationship is evident in a text exchange between Mr Senty and Ms Byron on 5 December 2018:

Q Hi Mike Justine here. Just want to check the account Name and number for your wages.. can you please just confirm that what I have is correct....Thanks

A Yip they are all correct thank you

Q Thanks whats your full name please?

A Michael Henry vakai senty. But that's my partner's account for my wages.

[50] Ms Byron noticed Mr Senty had provided his partner's personal bank account to S & J Property for payment and thinking this was unusual because she expected a company account, she double checked this. Mr Senty confirmed it was the correct account and it was his partner's account. Neither party asked any further questions.

[51] Mr Senty could or should have noted the heading on the IRD form that would have signalled to him that he was entering into a contracting relationship. The form was prepopulated and dated and given to him to sign sometime after he had already started working. Mr Senty's evidence is that he thought, and was correct, that tax was being deducted by S & J Property on his behalf, but it was, in fact, withholding tax not PAYE.

[52] He says his response to tax being raised in discussions with the Byron's was to inform them that his tax code was "MSL" and Ms Byron confirmed she heard that.

[53] Mr Senty's evidence was that he had this form fleetingly and although he accepts he signed it, he did not properly consider it or recognise the significance of it. He also did not realise it was the type of tax that applies only to contractors and signed it working on the basis of his understanding that he was an employee. He usually took documents home so that he and his partner Justine could review them together but did not in this case.

[54] Given the evidence from Mr Senty and the submissions made on his behalf, that he was not set up as a contractor, had no knowledge of how to operate as a contractor, together with the fact there was no evidence of Mr Senty operating a company, starting with providing his partner's personal bank account to S & J Property for payments, I accept that that Mr Senty has overlooked the significance of the IRD form in those overall circumstances.

[55] I also accept that S & J Property were certain they were entering into a contractual relationship. This means I find that the evidence on its face indicates there was no common intention between the parties. I am satisfied that during the various conversations and interactions between the parties there were genuinely held but differing views as to the nature of the relationship resulting in no mutual or common understanding of the arrangement between the parties.

[56] Section 6(3) of the ER Act provides that, in determining the real nature of the relationships the Court or Authority must consider all relevant matters which necessarily includes the intention of the parties, but is not to treat the "label" as determinative.

[57] Given I find no mutual intention between the parties and following the guidance set out in *Bryson v Three Foot Six*,⁷ the next step is to have regard to the features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental or economic test) as well as how the relationship operates in practice.

[58] For completeness, James Underhill gave evidence that he and Mr Senty had at least two conversations about sick leave and employment status suggesting Mr Senty knew the difference between a contractor and an employee. Those conversations occurred much later so they are of limited assistance in resolving the parties' intentions at the start. They do represent another conflict in the evidence and to the extent that those conversations are relevant to the overall consideration they are referred to further below.

Control

Control at work sites

[59] High degrees of control are more consistent with an employment relationship than a contracting agreement. Mr Senty said he was expected to follow Mr Byron's instructions and had no ability to do what he wanted, when or how he wanted. Mr Byron says he did not supervise the work on a day to day basis but he was ultimately responsible to the clients' of S & J Property in relation to work carried out by S & J Property which was Mr Senty and others and there was no evidence of anyone else having oversight of the work.

[60] Mr Byron sourced the fencing work on behalf of S & J Property. The work sites were all over the Wellington region and the text messages and evidence confirmed that Mr Byron determined what sites Mr Senty went to and when, daily start times, and also co-ordinated materials and they communicated by text about job specific details. There was conflict in the evidence about how much supervision this amounted to but it was confirmed that he allocated the work, checked the work done at the end of each job and was present at some job sites on occasions.

⁷ *Bryson v Three Foot Six*, above n2.

[61] There was one text message telling Mr Senty that high visibility safety clothing was required on a job. Mr Byron accepted under cross examination that he ran the tool box meetings suggesting he took responsibility for health and safety.

[62] The text messages provided (although not a complete record) predominantly informed Mr Senty where to start each day which was either an address for a job site or the Byron's house and what time. There were text messages about being rained off and Mr Senty letting Mr Byron know that he needed to day off and the reasons.

[63] I conclude that Mr Byron did exert control at worksites despite not being on each site on a day to day basis.

Choice about when to work

[64] I regard there to be a general pattern of control by S & J Property over Mr Senty but the strongest factor that tends to suggest a contracting arrangement was the submission that Mr Senty exercised autonomy and choice about when to work demonstrated by significant amounts of time off, flexibility in work hours and sometimes not informing Mr Byron that he was going to be absent.

[65] On closer analysis however, I did not find this to be as persuasive as it first appeared, particularly when there was no dispute that from approximately August 2019 onwards Mr Senty health issue progressively affected him and ultimately impacted on his ability to work at all. Mr Bryon accepted Mr Senty worked most weeks and that his hours varied predominantly in the last 3 months. The "timesheets" and invoices provided, although not a complete set, confirmed that. He also accepts that mostly Mr Senty's time off was for family or health reasons.

[66] Under current law employees are now entitled to 10 days sick leave a year but at the time it was 5 days. There were two consecutive weeks Mr Senty did not work because of his back issue which leaves 20 days unaccounted for. There were also a number of days when Mr Byron told Mr Senty not to come to work (that were not quantified but some were confirmed in the text messages) and then there were additional sick days as Mr Senty became increasingly unavailable for work towards the end due to his back issue.

[67] Comparing Mr Senty's pattern of work with the number of sick days the legislation anticipates, the total number of days away sick does not strongly indicate that Mr Senty was exercising autonomy over when to work but rather that he had a health issue that was impacting on his ability to work. The text messages also show Mr Senty often explained absences although I accept this is not a full set of communications. But it is accepted most absences were towards the end when Mr Senty had a health issue which provides a context to the absences.

[68] I am satisfied by the evidence from both parties that Mr Senty's absences were predominantly driven by a need to support a family and a health issue rather than a contractor exercising autonomy or choice about when to work.

Choice of work

[69] The evidence about this was conflicting and it was difficult to tell whether the parties were talking about "perk jobs" that are occasionally done when the opportunity arises or contractors doing work for others to further the contractors own business. In any event the evidence, once clarified, was that Mr Senty had only done two such jobs which I do not find to strongly indicate Mr Senty working on his own account elsewhere.

[70] S & J Property said Mr Senty also turned down work. Mr Senty's evidence was that he never turned down work. On one occasion he expressed concerns about a particular site because of how steep it was and Mr Byron reassigned him to a different site. Mr Senty says he would have attended the site if instructed. I accept it was established that he did turn down at least one job.

[71] The evidence about Mr Senty choosing which jobs to attend and doing work for others occurred on only a handful of instances and I do not find these to be factors that strongly indicate the nature of the relationship either way.

Features of integration

[72] 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.⁸

[73] It was Mr Senty's evidence that he considered himself to be an employee and was integrated into the business. Mr Senty drove a work vehicle with the company logo on it and at some point Mr Senty's name was added to the driver's door. The Byrons say that was not a feature of integration but simply a nice thing to do for Mr Senty. It was clear that both parties had held each other in high regard and the Byrons' considered most of the features of integration that Mr Senty refers to as being supportive and rewarding of good work while remaining clear that it was a contracting relationship.

[74] There was conflicting meaning ascribed to the issue of uniforms. Mr Byron had some old shirts with the company logo on them that he says he gave to Mr Senty as a favour. Mr Senty gave evidence that he understood he was to wear them as much as he could on private jobs, accepting that they had to wear high visibility vests on some work sites. Photos were produced of Mr Senty not wearing the shirts at work. Mr Underhill gave evidence he was not asked to wear uniform. Mr Byron said he and his son Corban do sometimes wear the shirts but the contractors are not expected to wear them.

[75] With regard to tools, Mr Senty was issued with company tools and a tool box which he used initially but later elected to purchase his own tools.

[76] There was conflicting evidence about a fuel card, an eftpos card and a Bunnings card. Mr Senty recalled cards were issued in his name whereas the Byrons were clear they never issued cards in the names of anyone else. They confirmed that a fuel card and a Bunnings card were provided to Mr Senty meaning S & J Property intended that the business and not Mr Senty purchased work supplies and fuel for the van. On one occasion the Byrons gave Mr Senty an eftpos card when they went on holiday.

[77] Mr Senty also said he was designated as foreman from time to time meaning and had oversight over others. This was denied by the Byrons who said he was asked to cover on one occasion while they were away on holiday overseas. An S & J Property health and safety assessment form was produced showing Mr Senty recorded as

⁸ *Barry v CI Builders Limited* above n1 at [31].

“foreman” but with Mr Byron’s name also recorded. This tends to support Mr Senty’s evidence that there were times when he was given some degree of responsibility.

[78] The tools I consider to be a neutral factor because it could have been Mr Senty’s preference to purchase his own and the guidance in *Barry v CI Builders* confirms this arrangement is common in this industry. Similarly the shirts I also find to be a neutral factor because everyone involved appeared to have a different understanding about the shirts.

[79] Provision of the cards and a work van with Mr Senty’s name on the door is indicative of integration. It is unlikely customers of S & J Property would be able to tell whether Mr Senty that was a contractor. S & J Property would also have received a tax advantage as a result of the purchases Mr Senty made on those cards.

[80] Overall I find that the provision of the cards and the work van to be factors that strongly suggest integration into the company.

The fundamental/economic reality test

[81] The main question here is whether Mr Senty was in business on his own account. Mr Senty submits he was being paid wages and did not know how to operate as an independent contractor, had no company bank account, and mistakenly understood that PAYE was being deducted. There were no payslips and he was unaware that invoices were being created on his behalf. Payment was on a “time in attendance” basis not by results and he never provided quotes for jobs and filled in time sheets. The evidence from IRD shows that other than withholding tax, no other tax was paid.

[82] Mr Senty accepted that at times early on, he purchased work items with his personal money and those were reimbursed but he says they were not claimed by him as part of running a business and only happened initially.

[83] Mr Senty’s hourly rate was discussed at the first meeting. Mr Byron said it was open for negotiation but Mr Senty said it was not and he just agreed because he was desperate for work. It was undisputed that from then on Mr Senty had no say and that unilateral decisions were made about pay rises and payment of bonuses as reward for

work well done and that tends to suggest an employment relationship because of the lack of input from Mr Senty.

[84] It was submitted the rate of pay should have been much higher if Mr Senty was genuinely a contractor because the rate of pay was not sufficient to compensate for additional administration fees, lack of holiday and sick leave, insurance, ACC and tax levies and other costs associated with the operation of a business. No specific evidence was given in relation to indicative rates of pay to enable to me to assess this further.

[85] The strongest factor that Mr Senty was not working on his own account is that overall he bore no risk or chance of making a profit. He did not quote for jobs and his employer made unilateral decisions about two pay increases and bonuses. At an average of 35 hours per week, he was also engaged close to full time if the hours were average and as such was growing the Respondent's business apart from when a health issue or family commitments prevented him from being at work. The business indeed did grow over the time Mr Senty was employed as Mr Byron gave evidence about increasing from two to approximately six people in less than a year.

[86] The strongest factor that Mr Senty was working on his own account was that he never requested annual or sick leave to the extent that Mr Senty asked for a loan from S & J Property when he needed extended time off (due to his back injury) rather than sick leave. However, I accept his evidence that from the first meeting about prospective work that he understood it was the practice of S & J Property not pay sick leave which is why he asked for a loan and did not discuss sick leave.

[87] I accept that S & J Property had its own system set up to help contractors who from past experience needed assistance. Ms Byron provided time sheets that Mr Senty was to fill in and she invoices created from that information. Wages were paid on a per hour basis rather than job based although this is not always determinative of an employee relationship.

[88] Naturally because of S & J Property's intention to engage a contractor, it did not deduct PAYE or contribute to Kiwisaver but did deduct withholding tax.

[89] The status of a relationship can change over time. James Underhill, a contractor to S & J Property, worked alongside Mr Senty on several different sites towards the end

of Mr Senty's time with S & J Property. Mr Underhill stated that he was aware that Mr Senty would have preferred to be a contractor and although he did not know why, and thought it might be because of issues with his hip. He remembers a couple of occasions on wet days they discussed leaving early so they would not get sick because they did not receive sick pay. In approximately September 2019, Mr Underhill recalled a specific conversation that Mr Senty initiated with him suggesting a meeting with the Byrons to talk about whether they could become full time employees.

[90] In response to Mr Underhill's evidence, Mr Senty said that he recalled having that conversation with Mr Underhill about not being paid for sick days but not about a contracting arrangement. Mr Senty denied the conversation with Mr Underhill in the terms Mr Underhill recalls it. He said they did talk about pay for sick days or rained off days but Mr Senty's evidence is that he did not realise that meant becoming an employee rather than being an independent contractor because he did not understand the difference between the two. Mr Underhill had been an independent contractor and an employee before so was familiar with both ways of working and the differences between them.

[91] Again this is a conflict in the witness' respective positions but there was no clear evidence that Mr Senty expressly stated that he considered himself to be a contractor. I consider it likely that there was a misunderstanding between Mr Underhill and Mr Senty about what each was talking about even though the issue they discussed was payment for sick or rained off days. I found them both to be credible. I have taken into account the fact that Mr Underhill was familiar with the difference between the two types of relationships and that they only worked together for a short amount of time and note that Mr Senty stopped working shortly after so no further discussion occurred.

Overall impression

[92] It has been found that features of control are strongly indicative of an employment relationship.⁹ Although in this case there were some indicators of self-employment (the Byron's intention and the invoicing system), Mr Senty and Mr Byron appear to have worked closely day to day even if Mr Byron was not always present at work sites. No evidence was provided of anyone else providing oversight and/or

⁹ *Bryson v Three Foot Six Ltd* above n2.

instruction to Mr Senty and given it was a small family business, Mr Byron gave the impression he was in charge and was in fact growing the business such that he was increasingly taking more of a co-ordination role and did not work on jobs as often himself, hence the need for others to do the work that he used to do himself.

[93] Leaving aside intention (because there was no common intention), other than the time off, there is no definitive evidence that Mr Senty was operating a business on his own account and the situation he finds himself in regarding ACC is also consistent with that position.

[94] There are many of examples of cases where payment was on the basis of invoices, and the person has paid GST and ACC levies, but was held not to be in business on their own account¹⁰ meaning the contractual labelling was not accurate in terms of the true nature of the relationship. I note that in *Bryson v Three Foot Six*,¹¹ Mr Bryson was paid by invoice and categorised as self-employed for tax purposes but these were found to be only indicators of self-employment and he was ultimately found to be an employee. Evidence of invoicing of the appellants services and of taxation arrangements was held not to provide any support for the respondent's case "because those arrangements appear to have been mere consequences of the contractual labelling of him as an independent contractor."

[95] Overall, I find that Mr Senty was reliant on the employer for provision of work and income and that time away from work was not indicative of operating autonomously but was a result of wider circumstances for Mr Senty during that time period.

[96] No evidence was provided about industry practice although supplementary submissions touched on industry practice regarding tools and the guidance set out in the *Barry v CI Builders*.¹² Following that guidance using one's own tools is not a strong factor indicative of contracting in this case because it is common in the industry to use a combination of one's own tools and the company equipment and tools.

¹⁰ *Raine Blackadder Ltd v Noonan* (2006) ERNZ122, (2006) 3 NZELR 125 (EmpC), *Bryson v Three Foot Six Ltd*. And recently *Barry v CI Builders Limited*.

¹¹ *Bryson v Three Foot Six* above n2.

¹² *Barry v CI Builders* above n1.

[97] On the whole, Mr Senty worked solely for S & J Property and lacked scope to increase his income through his own efforts as would be expected of a contractor who is in business for themselves. I am satisfied that on balance the real nature of the relationship and the way in which it operated in practice was more akin to an employment relationship.

Conclusion

[98] After examining the factors of control, integration and the fundamental or economic reality test, I consider that despite there being some mixed indications and the parties' respective and differing intentions at the start, I find that the real nature of the relationship between the parties was one of employment.

[99] Given this finding, it is left to the parties to resolve the issue of outstanding statutory entitlements including annual leave, sick leave and statutory holidays. If the parties are unable to do so, the matter can come back to the Authority for determination of those issues.

Costs

[100] Costs are reserved.

Sarah Kennedy
Member of the Employment Relations Authority