

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 159  
3078553

BETWEEN	SIMON DODD Applicant
AND	RESULTEX LIMITED First Respondent
AND	INOV8 LIMITED Second Respondent

Member of Authority: Michele Ryan

Representatives: Tanya Kennedy, counsel for the Applicant  
Renee Butler and Katie Alexander, counsel the Respondent

Investigation Meeting: 10 February 2021

Submissions Received: Written submissions provided by both parties on the day of the investigation meeting

Date of Determination: 22 April 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Simon Dodd has lodged several claims with the Authority including that he was unjustifiably dismissed.

[2] Before those matters may be progressed, there is a preliminary issue concerning whether Mr Dodd was employed by one (or both) of the respondents, Resultex Ltd (“Resultex”) and Inov8 Ltd (Inov8) or whether he provided services to either of those entities as an independent contractor.

[3] This determination deals solely with the preliminary issue. If Mr Dodd is found to have been employed by either of the respondents, the Authority may investigate his claim. If it is determined Mr Dodd was an independent contractor, the Authority does not have jurisdiction to consider the matter.

### **Background information**

[4] Resultex Ltd (“Resultex”) and Inov8 Ltd (“Inov8”) are both wholly owned by a parent company.

[5] Resultex is described as being similar to a recruiting company whereby it contracts IT specialists to provide services to its clients.

[6] Inov8 is a software development company specialising in Microsoft products and is a client of Resultex.

[7] In 2019 Inov8 sought to introduce a new business model. Inov8’s General Manager, Ms Roberta Merito considered Inov8 needed the services of a Programme Coordinator to create the internal processes necessary to operate the new strategy.

[8] Mr Dodd and Resultex were already known to each other prior to the events leading to his claim, and in 2018 they had discussed a potential work opportunity.

[9] In early June 2018, Ms Angela Brockwell, Senior Accountant Manager for Resultex, contacted Mr Dodd by email. Mr Dodd responded. Ms Brockwell advised Inov8 was looking for a Programme Coordinator and offering a 6 month contract. At this point in time Mr Dodd was working as an independent contractor, and he replied stating: *“Please can you advise the rate of the contract. I’m currently in a contract although I could be looking to move if it’s the right opportunity”*.

[10] Further information was provided. As it transpired, Mr Dodd decided to stay in his current role providing services to an energy company.

[11] Almost a month later, on 8 July 2019, Mr Dodd called Ms Brockwell. He said his current contract was coming to an end and he advised he was open to new opportunities. The pair met and discussed the Project Coordinator position and corresponding rate. Mr Dodd was subsequently interviewed by Inov8’s General Manager, Ms Roberta Merito.

[12] On 15 July 2019 Mr Dodd received the “Contracting Services Agreement” (the “services agreement”) citing Mr Dodd and Resultex Ltd as the parties to it. Mr Dodd’s signed the document that day. Inov8 was referred to as “the customer”.

[13] Mr Dodd’s began working at Inov8’s premises, (shared also with Resultex) on 29 July 2019. Thirteen working days later, on 14 August 2019, Inov8 terminated the contract it had with Resultex for the provision of Mr Dodd’s services as a Programme Co-ordinator.

[14] I pause to note it is clear there was a difference of understanding between the parties as to the scope of the role. Mr Dodd says he was employed to set up a Project Management Office (PMO). In contrast Ms Merito says Mr Dodd was engaged as a Programme Coordinator to establish and implement internal processes for the company’s new business strategy.

[15] After Mr Dodd was advised his work at Inov8 was ending he sent Angela Brockwell a text message, as follows:

Angela, can you give me a call ... Roberta has just advised which I tend to agree with this contract isn’t working out, therefore I am interested to know the legal status of notice period etc, thanks Simon

[16] In a letter of the same date Resultex advised Mr Dodd “... *we will be working to find you another assignment and will keep in contact for other opportunities.*” An alternative contract did become available but Mr Dodd did not consider it suitable.

[17] Resultex says Mr Dodd was not dismissed by it and that he remains on their records should work become available.

[18] Mr Dodd, and Ms Sharon Woodley, a director of both respondents; Ms Angela Brookwell, Senior Account Manager for Resultex and Ms Roberta Merito, General Manager of Inov8 each provided evidence and information to the Authority on the preliminary issue.

[19] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act (the Act). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.<sup>[1]</sup>

---

<sup>[1]</sup> Employment Relations Act 2000, s 174C(4)

### Framework for analysis

[20] The onus sits with Mr Dodd to establish, on the balance of probabilities, that he was an employee.

[21] To determine whether Mr Dodd's was an employee, the Employment Relations Act 2000 (the Act) requires the Authority to determine the real nature of the relationship between parties, in this case between Mr Dodd and the respondents. To this end I must consider "all relevant matters", including any matters that indicate what the parties intended Mr Dodd's status to be, but neither that factor nor how the parties' labelled the relationship may determine the outcome alone.<sup>1</sup>

[22] In *Bryson v Three Foot Six Limited*<sup>2</sup> the Supreme Court provided further guidance when assessing the real nature of the relationship.<sup>3</sup>

- (i) The judgement noted that "all relevant matters", include any written and oral terms between the parties which may indicate a common intention as to the status of the relationship, as well as any divergences from those terms.
- (ii) The Court further emphasised that it was important for the Court or the Authority to ascertain how the relationship operated in practice, and against that background will be able to properly assess:
  - who controlled how the work was done (the control test),
  - whether the work was integrated into the business (the integration test), and
  - whether the person contracted, had, in effect, been working on his or her own account (the fundamental test).
- (iii) Evidence of industry practice may also be relevant but is not determinative.

---

<sup>1</sup> Employment Relations Act 2000 at s 6(3)(a) & (b). See too *Barry v CI Builders Limited* [2021] NZEmpC 82 at [6].

<sup>2</sup> [2005] ERNZ 372

<sup>3</sup> Above at [32]

- (iv) Taxation status may provide an indication as to nature of the relationship. The Court has noted care must be taken as to whether the tax arrangements may be a consequence of labelling the worker as an independent contractor.<sup>4</sup>

[23] An inquiry into whether a person was an employee or independent contractor is often intensely fact-specific. Each case must be seen in light of the particular circumstances between the parties and there may be factors in a case that both point towards an employment relationship and to that of a principal and independent contractor. In *Poulter v Antipodean Growers Limited* the Court concluded that s 6 requires the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>5</sup>

### **Relevant matters**

#### ***What were the written arrangements between the parties?***

[24] The terms of the service agreement included:

#### [25] The way the relationship was described

- (i) There is no dispute that the services agreement characterised Mr Dodd's relationship with Resultex as that of an independent contractor. It expressly recorded: “ ... *no relationship of employer and employee exists between Resultex and Simon Dodd as a result of this agreement.*”
- (ii) The services agreement similarly stated there was no relationship between the customer (in this case, Inov8) and Mr Dodd.

#### [26] Tax arrangements, timesheets and invoices

- (i) The services agreement recorded also that Mr Dodd would provide Resultex with a completed IR330 setting out the withholding tax rate that Resultex should deduct from the amount paid to him and pass that sum to Inland Revenue.
- (ii) Mr Dodd was also to provide Resultex with a Timesheet invoice on the first of the month following hours worked.

#### [27] Other work

<sup>4</sup> *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1

<sup>5</sup> *Poulter v Antipodean Growers Limited* [2010] NZEmpC 77 at [21].

- (i) Counsel points to a clause headed “Other Contracts” in the services agreement and says the provision prevents the applicant undertaking other work without Resultex’s agreement, which is characteristic of an employment relationship.
- (ii) I note the restraint prevented Mr Dodd from obtaining other work that “*compromises*” Mr Dodd’s ability to provide the agreed services to Resultex. The prohibition on who Mr Dodd may work for is more narrow than that asserted on Mr Dodd’s behalf.
- (iii) Further the service agreement acknowledges Resultex “*has no right of exclusivity over Simon Dodd*”.

[28] Material that associates the worker with the hirer’s business

- (i) Next, there is a provision which provides for Mr Dodd to use Resultex’s business cards while representing it. The clause expressly states that business cards were for publicity purposes only and advises the use of these did not indicate an employment relationship between them. In any event Mr Dodd was not furnished with either of the respondents’ business cards and is not therefore a factor that is relevant to my assessment.

[29] Insurance, and non - solicitation provisions

- (i) I am not satisfied that a clause which allows Mr Dodd’s to be covered by Resultex’s indemnity and liability insurance is an exclusive indicator of an employment relationship. Presumably the purpose of the clause was to protect Resultex from any claims against it which may involve Mr Dodds. It is clear the clause does not cover Mr Dodd’s business.
- (ii) It is further suggested a non-solicitation clause which prohibits Mr Dodd’s from seeking to obtain work with Resultex’s customers (without Resultex’s involvement) is a provision more likely to be seen in an employment agreement. I am not persuaded. A provision of this nature is not unexpected where an independent contractor may be involved with an agent’s clients. Neither of these clauses unequivocally demonstrate the relationship was one of employment.

[30] The basis for payment

- (i) Mr Dodd refers to two clauses in the service agreement which, separately, provide that the duration of the services agreement is for 6 months, and that

hours of work were set at 40 hours a week. I understand these have been highlighted because it is argued for Mr Dodd that an independent contractor is more likely to be remunerated according to the completion of a task rather than the time worked.

- (ii) Ms Merito's explanation (for the inclusion of these clauses) is that her assessment (and corresponding budget) for the project would likely take 6 months (based on a 40 hour week) to complete. She concluded that Mr Dodd could work up to 40 hours a week without her involvement but if he wished to work more than that it would need to be agreed. I understand this was a means of ring-fencing the budget allocated for the project.
- (iii) I am further not satisfied the hours of work were "set", where the services agreement (and attached schedule) allowed for longer (or fewer) hours as agreed or authorised by Inov8.
- (iv) Ms Merito's evidence provides a credible explanation for the inclusion of those provisions and it is clear that neither of these provisions were absolute.

Findings concerning the content of the services agreement as a means to assess the parties' intentions

[31] Assessing the services agreement as a whole, the overall impression is that Resultex and Mr Dodd both intended the services to be provided as an independent contractor. This is particularly apparent from the words used to characterise the nature of the relationship together with the mechanisms by which Mr Dodd would be paid including his ability to nominate the quantum of withholding tax Resultex should deduct (at [24](i) and [25](i)).

[32] The provisions referred to at [26]-[28] do not advance a finding as to Mr Dodd's status one way or the other.

[33] The clauses concerning the duration of the services agreement and hours of work do not displace an overall impression gleaned from the document as a whole.

[34] I accept Mr Dodd may not have been fully apprised of the legal implications the services agreement may have as compared to that of an employee, but I consider it telling that he accepted, during the Authority's questioning, that he understood the services agreement between himself and the respondents was not an employment agreement and was aware at the time when he entered the agreement that:

- (i) he was required to invoice Resultex to be paid;
- (ii) that he was on a different tax rate than if he were an employee;
- (iii) he was receiving a higher remuneration rate for the work than he could anticipate as an employee;
- (iv) that he was able to claim back expenses which he could not do as an employee. Mr Dodd agreed his accountant did this for him on his behalf;
- (v) he did not receive holiday pay;
- (vi) there was no ongoing certainty that the work would continue.

[35] Further, there is evidence that in the 10 years prior to his engagement with Resultex and Inov8, Mr Dodd had worked as an independent contractor (spanning approximately 2 to 2.5 years in total) for at least three different entities.

[36] Mr Dodd was not inexperienced as to the practical effect of the services agreement. It follows that I am not persuaded he was vulnerable worker who had agreed to be an independent contractor without a proper understating of the impact of that arrangement.<sup>6</sup> From the evidence I heard at the investigation meeting I am satisfied that Mr Dodd and Resultex had a shared common intention for Mr Dodd to provide his services as an independent contractor.

### ***The work in practice***

[37] No evidence was produced to demonstrate the relationship between Mr Dodd and the respondents operated differently in practice to the terms set out in the service agreement.

### ***Control***

[38] The test involves an assessment as to the extent in which the person performing the work may control the work undertaken and how it is performed.

[39] Mr Dodds says there were a range of ways in which the work he undertook was directed by Inov8 which demonstrates he was an employee, as follows:

[40] Work from home

---

<sup>6</sup> *Leota v Parcel Express Limited* [2020] NZEmpC 61

- (i) Mr Dodd points to an incident where he sought to work from home on 2 August 2018 but that the request was declined by Inov8. I am not persuaded this incident alone demonstrates a level of control such that I can confidently conclude Mr Dodd was an employee. I accept Ms Merito's testimony that the nature of the work Mr Dodd was contracted to perform could not (at that time) be undertaken away from the office.

[41] Set hours

- (i) Mr Dodd says he was required to be at Inov8's offices between 8.30 to 5pm. No evidence was produced to demonstrate the pattern was set by Innov8, and I consider it more likely these hours simply suited Mr Dodd.

[42] Directions to work

- (i) I have some doubts that Mr Dodd was supervised "*every day*" given Ms Merito was on annual leave for 5 of the 13 days Mr Dodd attended Inov8. Ms Merito says she explained to Mr Dodd on several occasions what she wanted to achieve, (as opposed to telling him what to do), but accepted that, in the absence of Mr Dodd progressing the project work, she asked him to perform three separate tasks over the time he worked at Inov8. She says she did not expect she would need to do so and had anticipated he would be telling her what was needed for Inov8 to transition to the new model.
- (ii) I am satisfied Inov8 exercised some control over the work Mr Dodd undertook. But I am not satisfied the control exerted is indicative of an employment relationship in the circumstances and taking into account the reasons why Inov8 took an active approach to Mr Dodd's activities. Ms Merito says she had anticipated Mr Dodd would initiate and implement the processes needed to achieve Inov8's strategic plan, and that the work would be undertaken independently by Mr Dodd. However this did not happen, and Ms Merito was prompted to provide Mr Dodd with some tasks. She says after engaging Mr Dodd for a little over 2 weeks very little had been achieved, whether the work was directed, or otherwise. In contrast, Mr Dodd says he was not given sufficient work.
- (iii) It is difficult to assess the extent of control exercised by Inov8 over the work or services to be provided by a Project Coordinator under the service agreement

where there is no consensus between the parties as to the scope of the work or services that were to be performed in practice.

- (iv) I am not confident however that that the three pieces of work assigned to Mr Dodd reflected the role either party had envisaged at the time the services agreement was agreed. This was conceded by both Mr Dodd and Ms Merito during the investigation meeting. It appears there is some consensus between them that Mr Dodd was not fully occupied during his time at Inov8. Whatever the content of the role, I am not persuaded it had been bedded in by the time the contract was terminated.
- (v) There is insufficient evidence to make a finding that the control exercised by Innov8 over the work Mr Dodd's performed is sufficient to establish an employment relationship.

### ***Integration***

[43] The integration test requires an assessment as to the extent Mr Dodd was integrated into, and part and parcel of, the respondents' business as opposed to an being accessory of it.

#### [44] Equipment

- (i) Who supplies the resources necessary to perform a role may indicate the level of integration in a business.
- (ii) On behalf of Mr Dodd it is said that Invo8 acted as an employer by requiring him to attend its premises, and it provided the equipment needed for Mr Dodd to perform the work. In this case he was supplied with a PC, a desk and desk phone. There is evidence also that various Microsoft programmes were purposefully installed on the PC in readiness for Mr Dodd to begin the roll. Mr Dodd was assigned an Inov8 email address.
- (iii) Ms Sharon Woodley, a director of both Resultex and Inov8, says it was common practice for its customers (including Inov8) to allow the contractors with access to its premises and to any equipment needed so that the work can be performed. This is because its contractors are experts in IT, project management and/or coordination, and business analysts, and the nature of the work performed by these individuals generally require access to the customers internal systems and data. Mr Dodd did not challenge this evidence and I accept it. It follows that I

am not persuaded that the provision of equipment in the circumstance of the parties demonstrates an employment relationship.

[45] Alternative work

- (i) The ability for the worker to be free to work for others at the same time s/he works for an entity is a feature available to an independent contractor. There is no evidence that Mr Dodd had other employment whilst working for Inov8.
- (ii) However, Mr Dodd interviewed for a position with another entity during his first week with Inov8. He says the interview was arranged prior to his acceptance of the role with Inov8. It remains unclear why Mr Dodd would interview for a position if he considered he was contractually committed to a 6 month fixed term agreement.
- (iii) On balance I consider it more likely that Mr Dodd attendance at a job interview whilst working at Inov8 suggests he was comfortable pursuing additional work while maintaining a relationship with Inov8. His actions in this way reinforce Mr Dodd's concession that he regarded himself as an independent contractor.

[46] Training

- (i) I am unwilling to conclude that Mr Dodd's attendance at a Health and Safety Induction training session during the course of his second day at Inov8 unequivocally supports an employment relationship. Whether as a contractor or employee I am satisfied by the evidence that this information was provided to all site attendees irrespective of their status.

***The Fundamental test***

[47] This test, also known as the "economic reality test", explores the extent to which Mr Dodd was engaged to perform the services as a person in business on his own account. It is my assessment based on the following evidence that Mr Dodd was in business on his own account.

- (i) It is clear Mr Dodd did not enhance his remuneration beyond the confines of the two and a half working weeks at 40 hours per week that he undertook at Inov8. But I find there was the potential, at least to some degree, to effect the level of remuneration he could receive by increasing or limiting his attendance at Inov8's offices. His ability to exercise choice over that matter indicates an

element of financial risk in performing the work. This conclusion tends towards a finding that Mr Dodd was an independent contractor.

- (ii) I have already noted caution must be given to a worker's taxation arrangements where there is possibility these may simply be a product of the way in which the relationship was labelled. However, Mr Dodd's actions concerning how he received payment from Resultex, including how he wished Resultex to engage with him as to his obligations suggests he was in business on his own account and regarded himself as an independent contractor.
- (iii) First, there is no dispute Mr Dodd completed the Inland Revenue "Tax rate notification for contractors" form on the second day at Inov8. On that document he declared his tax code was "WT" (the acronym for Withholding Tax) – for which the form declares is the material tax code assigned to independent contractors who receive scheduled payments.<sup>7</sup>
- (iv) Mr Dodd subsequently invoiced Resultex on two occasions. Both invoices recorded Mr Dodd's registered GST number. Each included a deduction for withholding tax. The means by which Mr Dodd could receive payment for work was wholly dependent on his furnishing an invoice to Resultex in accordance with the services agreement. The way in which Mr Dodd received payment for his services also aligned with the methodology agreed between the parties in the services agreement. This pattern of invoicing and receiving monthly payment is a commonly accepted practice between principals and independent contractors.
- (v) On both occasions in which Mr Dodd invoiced Result for his services, he billed an hourly rate of \$80. Mr Dodd accepts the rate was higher than he could expect if he was an employee performing the same role. There is no evidence that Mr Dodd claimed deductions for work related expenses at the end of the financial year, but he agreed these were likely claimed on his behalf by his accountant. I am confident Mr Dodd was aware of, and did benefit from, the tax benefits associated with being an independent contractor, compared to that of an employee.

### ***Industry practice***

---

<sup>7</sup>

IRD form IR330C

[48] It is clear IT Project Coordinators may be retained either as independent contractors or as employees. But there is no evidence of an industry wide preference as to the status of workers who provide these skills. An analysis of industry practice does not therefore provide any additional assistance in accessing the real nature of the relationship between the parties in this instance.

### **Conclusion**

[49] Having applied the legal tests to analyse the real nature of the relationship between the parties, the overall impression is that Mr Dodd's relationship with the respondents was as an independent contractor.

[50] Mr Dodd's application for a finding that he was an employee has not been successful.

### **Costs**

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so and an Authority determination is needed, the respondents may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Dodd will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[52] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

Michele Ryan  
Member of the Employment Relations Authority

---

<sup>8</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)