

**Attention is drawn to the Order Prohibiting
Publication of certain information in this
determination at [13]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 320
3115496

BETWEEN COOPER OSCARFONO
(PREVIOUSLY KNOWN AS
SOD OSCARFONO)
Applicant

AND CONSTRUCTION LABOUR
HIRE LIMITED
First Respondent

AND MULHOLLAND
CONSTRUCTION LIMITED
Second Respondent

AND PAUL MULHOLLAND
Third Respondent

Member of Authority: Trish MacKinnon

Representatives: Steph Dyhrberg, counsel for the Applicant
Paul McBride, counsel for the First and Second
Respondents

Investigation Meeting: 21 and 22 September 2021 at Wellington

Submissions and Further Information Received: 22 September and 29 September 2021 from the Applicant
22 September and 27 September 2021 from the First and
Second Respondents

Date of Determination: 13 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Cooper Oscarfono, who was at the time known as Sod Oscarfono, signed a labour only contractor agreement with Construction Labour Hire Limited (CLH or the company) on 11 December 2019. He started work the next day on a site in Levin that was managed by Mulholland Construction Limited (MC). Mr Oscarfono worked on that, and two other MC sites, until early May 2020.

[2] Mr Oscarfono claims he was misclassified as a contractor when in reality he was an employee from the outset. He claims holiday pay and outstanding statutory holiday entitlements.

[3] Mr Oscarfono asserts MC is a controlling third party in terms of s 103B of the Employment Relations Act 2000 (the Act) and should be joined to his personal grievance claim for constructive dismissal. He claims both CLH and MC were involved in the dismissal.

[4] As remedies for the personal grievance, Mr Oscarfono seeks compensation and the reimbursement of lost wages. Additionally, he seeks the imposition of penalties for breaches of good faith.

[5] Mr Oscarfono asserts that Paul Mulholland, who is the sole director of both CLH and MC, is a person involved in the breach of his statutory entitlements under s 142W of the Act. He seeks a finding that Mr Mulholland is liable under s 142Y for any default in payment of wages or other monies by the first or second respondents.

[6] A further claim in respect of a nail gun was withdrawn in the course of the Authority's hearing of the matter.

[7] The respondents reject Mr Oscarfono's claims and say he functioned as an independent contractor throughout his brief relationship with CLH. They say there was no employment relationship, triangular or otherwise, and MC is not properly the subject of these proceedings. Nor, in their view, is there any basis in fact or law for joining Mr Mulholland to the proceedings.

[8] They deny Mr Oscarfono was dismissed and say he has no valid claim against any of them.

The Authority's investigation

[9] An in-person investigation meeting was held over two days in September 2021 at which Mr Oscarfono gave evidence on his own behalf and five witnesses gave evidence for the respondents, four in person and one by Zoom.

[10] In accordance with s 174E of the Act, I am not required to set out all the evidence and submissions I received and I have not done so in this determination. I have, however, taken all such materials into consideration before reaching conclusions and making findings on facts and relevant issues of law.

[11] This determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Non-publication

[12] In the course of the Authority's investigation Mr Oscarfono sought a non-publication order over certain personal and sensitive information. The respondents did not oppose the granting of such an order and there is no public interest in that information being accessible to non-parties.

[13] I am satisfied it is appropriate to make the order and accordingly I make a permanent order for non-publication in relation to paragraph 2.13 of Mr Oscarfono's amended statement of problem; paragraph 25 of his main brief of evidence; paragraphs 44 and 82 of his reply brief of evidence; and document 46 (pages 65 and 66) of the Common Bundle of documents.

Issues

[14] The first matter to be determined is whether Mr Oscarfono was an independent contractor or whether he was in reality an employee.

[15] If he is found to have been an independent contractor, the Authority will have no jurisdiction to consider his claims further.

[16] If he is found to have been an employee, a number of issues will require determination including:

- (a) whether any minimum statutory entitlements are due;
- (b) whether he was constructively dismissed; and, if so,
- (c) by which respondent/s;
- (d) what remedies are appropriate;
- (e) whether Mr Mulholland is a person involved in a breach; and
- (f) whether penalties should be imposed.

Relevant background

[17] Mr Oscarfono has had a varied working life including experience, but no formal qualifications, in the building industry. By his own account, he also has skills and experience in IT and in sound engineering and was an employer for some years. In late 2019 Mr Oscarfono was seeking employment on the Kapiti Coast or Horowhenua when, at the suggestion of a friend, he contacted the (then) Accounts and Operations Manager for CLH.

[18] CLH is a labour-hire company established by Mr Mulholland to provide a pool of labour-only contractors to the construction industry generally, as well as to MC, which he describes as his family business.

[19] Following Mr Oscarfono's initial contact, he visited the CLH office in Paraparaumu on 11 December 2019. He met Mr Mulholland and accompanied him to a construction site in Waikanae, during which time they discussed Mr Oscarfono's background, experience and skills. This resulted in Mr Mulholland offering him a contract with CLH. Mr Oscarfono read and accepted the contract that day. He and Mr Mulholland completed the documentation with the CLH Accounts and Operations Manager when they returned to the CLH office.

[20] Mr Mulholland had advised Mr Oscarfono that most of the jobs on offer through CLH were in Wellington, although there were some on the Kapiti Coast. Mr Oscarfono, who was living in Waikawa at the time, expressed a preference for work in the Kapiti and Horowhenua area. He was offered, and accepted, work on a site in Levin that was operated by MC, and he started the next day. Mr Mulholland had indicated to Mr Oscarfono there was some work available until Christmas, which was less than two weeks away, but that he was unsure what was coming up after that.

[21] Mr Oscarfono worked on the Levin site until it closed down for Christmas and then accepted work on another commercial site in Paraparaumu over the holiday period. He then

worked on a residential construction site in Paraparaumu, where he remained until 23 March 2020 when New Zealand moved to Covid-19 Alert level 3.

[22] During the Covid-19 Alert level 4 lockdown that commenced on 25 March 2020 Mr Oscarfono had financial issues resulting from difficulty in accessing the Government wage subsidy. He received the Self-Employed/Contractor (Sole Trader) Covid-19 Consolidated Wage Subsidy on 15 April 2020.

[23] At the end of the lockdown in late April 2020, Mr Oscarfono returned to the Paraparaumu residential site where he worked until 8 May 2020.

The contract

[24] Before turning to the contents of the contract Mr Oscarfono signed with CLH on 11 December 2019, I note there was initial confusion over the identity of the first respondent. This arose from two entities being named on the contract. The logo on each page of the contract was that of Construction Hire Labour Limited, while the heading of the contract was “Labour Only Contractor Agreement For Construction Labour Hire *Wellington* Limited” (italics added). The party that signed the contract with Mr Oscarfono was also identified as Construction Labour Hire *Wellington* Limited.

[25] It was accepted by the respondents that the correct identity of the company that engaged Mr Oscarfono was Construction Labour Hire Limited. An amended statement of problem with the correct naming of the first respondent was lodged in the Authority in May 2021.

[26] The contract 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. It also referred to the contractor being engaged to work on assignments for third parties, arranged by CLH, and to there being no entitlement to ongoing work. The contractor was under no obligation to accept an assignment.

[27] The contractor could be contracted for the length of a job or for the day and there was no express or implied obligation on the company to offer any assignment. The assignments would be determined by the company’s requirements and would not constitute ongoing work. An assignment could be terminated without notice.

[28] Other features of the contract were that the contractor would be paid an hourly rate, which in Mr Oscarfono's case was set at \$28 per hour. Remuneration would be paid on a weekly basis, after presentation of a timesheet, or client letterhead completed with the hours worked and signed by the client. The contractor could issue an invoice to CLH for payment, or the company could generate one for him if required.

[29] Withholding tax at the required rate of 20 per cent would be deducted from money paid to the contractor who would be responsible for his own liability for any other tax, ACC levies, and other liabilities and expenses. If the contractor was GST registered, and a limited liability company, a tax invoice would be required by CLH.

[30] The contractor agreed to wear any clothing that may be required from time to time while undertaking an assignment, whether the clothing was provided by CLH or the client. The contractor was also to supply all necessary tools and equipment for assignments, although the company or the client could, at their sole discretion, sometimes supply them.

Legal considerations

[31] Section 6 of 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 determine the real nature of the relationship between them.

[32] 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

[33] The Supreme Court judgment in *Bryson v Three Foot Six Limited* (No. 2) is the leading case in determining the real nature of the relationship.² The Court held that "all relevant matters" included the written and oral terms of the contract between the parties and the way the contract operated in practice. The intention of the parties was relevant but not decisive in determining the real nature of the relationship. The Court or the Authority was required to "have regard to features of control and integration and to whether the contracted person has

¹ Section 6(3) of the Act.

² [2005] NZSC 34.

been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law.”³

[34] Mr Oscarfono seeks to join MC to the proceedings under the provisions of s 103B of the Act. Those provisions came into force on 27 June 2020, after Mr Oscarfono’s relationship with CLH had ended, and do not apply to this matter.

[35] While s 103B does not apply, Mr Oscarfono’s claim regarding a relationship with the second respondent may be considered under s 6 of the Act. A full court of the Employment Court observed in *Head v The Chief Executive of the Inland Revenue Department* there is no indication that, prior to the enactment of the Employment Relations (Triangular Employment) Amendment Act 2019, which brought in s 103B, Parliament intended to rule out the application of s 6 to a labour-hire arrangement.⁴ The court concluded s 6 was sufficiently broad and flexible and was “well capable of being applied in circumstances where unusual working relationships may fall for assessment.”⁵

Employee or independent contractor?

Intention of the parties

[36] Mr Oscarfono acknowledged in his evidence to the Authority that he had the intention of entering into the arrangement with CLH as an independent contractor. He said he had an expectation of a contracting arrangement and had previous experience of such arrangements. He referred in oral evidence to the contents of the contract as being “all the usual suspects” and said there was nothing in it that would have prevented him from entering into the contract.

[37] Mr Oscarfono acknowledged that Mr Mulholland, when giving him the contract, had suggested he take it home with him to read. He said he had wanted to start work immediately so did not do that and signed the contract that day.

[38] While there were some differences in the evidence given by Mr Mulholland and Mr Oscarfono over their discussion about the contracting arrangements, it was clear from Mr Oscarfono’s evidence that the contents of the contract came as no surprise to him and that he was familiar with what a contracting relationship entailed.

³ N2 at [32].

⁴ *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69 at [98(b)].

⁵ N4 at [98(c)].

[39] His situation can be distinguished from, for example, that of Mr Leota, a courier driver, who was determined by the Employment Court to be an employee not an independent contractor.⁶ The court in that case took into account that Mr Leota spoke English as a second language and did not have a grasp of the legal requirements relating to status or of the agreement he signed.⁷

[40] I am satisfied from Mr Oscarfono's evidence that, when he accepted CLH's offer of a labour-only contract in December 2019, he did so with the knowledge of what such a contract entailed, and with the intention of entering into that type of arrangement. He and CLH had a mutual intention that he would be a self-employed independent contractor.

[41] Having a mutual intention at that stage to have a particular type of relationship is not determinative of how the relationship actually worked. I turn now to considering how the relationship worked in practice. This will lead to an assessment of the extent of control exerted over Mr Oscarfono, whether and to what extent he was integrated into the first and second respondents' businesses, and whether he was effectively working on his own account.

How the relationship worked in practice

[42] Mr Oscarfono, in his in written evidence, asserted that what started as a contracting relationship evolved to the degree that he considered he was treated, and acted, as an employee. When questioned about the evolution, Mr Oscarfono said he began thinking he was an employee from early on in the relationship when he had asked Mr Mulholland about invoicing CLH for his services and was denied the opportunity to do so.

[43] Mr Oscarfono said he was paid on a timesheet basis and was not permitted to submit invoices as he would have preferred to do. He said he raised the issue of invoicing with Mulholland during his interview on 11 December 2019 and had told Mr Mulholland he had set up a limited liability company and preferred to invoice for his work and run things through the company so that he could claim expenses back. His recollection is that Mr Mulholland rejected his request saying the CLH was not set up for it.

[44] Mr Mulholland agreed Mr Oscarfono had raised the issue of invoicing with him but denied telling Mr Oscarfono CLH was not set up for invoicing. He said he told Mr Oscarfono there was no problem with his submitting invoices but it would be on a monthly basis and he

⁶ *Leota v Parcel Express Limited* [2020] NZEmpC 61.

⁷ Above at [5].

would be paid monthly accordingly. Mr Mulholland said Mr Oscarfono wanted to be paid weekly so his invoicing proposal went no further. In reply evidence, Mr Oscarfono denied that Mr Mulholland had raised an issue over weekly payment.

[45] I prefer Mr Mulholland's evidence that he told Mr Oscarfono he could invoice CLH monthly and would have been paid monthly. In doing so, I have taken into account the greater consistency of Mr Mulholland's evidence overall.

[46] However, I am concerned that Mr Mulholland's statement regarding monthly invoicing and monthly payment does not reflect the payment provisions of the contract CLH entered into with Mr Oscarfono. The contract provides at clause 5.3 that the contractor is to be paid weekly. Clause 5.4 provides that a timesheet or Client letterhead is to be provided and in addition the contractor may also issue an invoice or the company may issue one for them if required. Clause 5.6 provides that CLH will deduct withholding tax and pay it to IRD unless the contractor is GST registered and a limited liability company, "in which case a tax invoice will be required".

[47] There is nothing in those provisions to suggest that, if a contractor provides an invoice, such invoices are to be provided monthly or that the contractor will be paid monthly. That appears to be an overlay applied by CLH. As the contract provides no impediment to a contractor issuing an invoice weekly and being paid weekly and I find the obstacle raised by Mr Mulholland to Mr Oscarfono's doing so was not warranted.

[48] It potentially dissuaded Mr Oscarfono from taking full advantage of one of the benefits of being an independent contractor. While this, on its own, does not indicate that the real nature of the relationship was other than it purported to be, it is a factor to be taken into account along with all others.

[49] Other matters Mr Oscarfono referred to that made him believe he was an employee were that he worked only on sites controlled by MC; he was moved from site to site; CLH and MC also directed and controlled the work he did on those sites; and it/they directed the times he was required to work.

[50] In relation to the first of those matters, Mr Mulholland's evidence was that during Mr Oscarfono's brief time as a contractor for CLH he had expressed a strong preference for working in the Kapiti area where MC was based and where it had a solid presence. That was why the three assignments he had undertaken had all been on MC sites.

[51] In relation to his moving from site to site, Mr Mulholland noted that Mr Oscarfono had the opportunity to reject any assignment offered to him.

[52] I accept Mr Mulholland's explanation for all three of Mr Oscarfono's assignments being on MC worksites and find it is likely to have been as a consequence of the preference he had expressed for working in the local area. Mr Oscarfono had no guarantee that he would continue to be offered assignments in his chosen area and I do not consider the location of the three assignments he accepted over four and a half months is any indication of his employment status.

[53] I do not accept Mr Oscarfono's evidence that he was moved from site to site, which implies he had no choice in the matter and would, if correct, indicate a significant degree of control was exercised over him. When questioned about his move from the Levin site that was closing down over Christmas to a commercial site in Paraparaumu, Mr Oscarfono said he had received a phone call from either the CLH Accounts and Operations Manager or Mr Mulholland asking if he wanted work over the Christmas period and he had put his hand up for the Paraparaumu work.

[54] In his written evidence, Mr Oscarfono said he "got moved" from the Paraparaumu commercial site to the Paraparaumu residential site at the request of Trent Uren, the site manager of the residential site. Mr Oscarfono implied this indicated a lack of choice on his part.

[55] Mr Uren denied he had made that request. In oral evidence, Mr Oscarfono referred to speaking with Mr Uren about the residential site before he started working there. He said the construction sounded amazing and that Mr Uren was lamenting the quality of the labour he currently had. It was clear from Mr Oscarfono's evidence that he wanted to work on the site and had made his interest known.

[56] In relation to work on site, it was Mr Oscarfono's evidence that he had no autonomy in his work, which was all directed and controlled by CLH or MC. He said he simply did as instructed by, usually, the site manager. This was in contrast to Mr Oscarfono's previous experience of operating as a contractor where he said he would be given a task and he would organise how to do it. He acknowledged he supplied his own small tools but said larger ones were supplied on-site.

[57] Mr Mulholland's evidence was that every construction site had someone, whether it be a site manager or foreman, who was responsible for running the project in accordance with the consented plans. The plans specified what was to occur and the site manager directed the contractors and subcontractors to the tasks that were required to get the work done.

[58] Mr Uren who, as noted above, was the site manager at the Paraparaumu residential site where Mr Oscarfono spent the majority of his time, also gave evidence about this. He told the Authority he was engaged by CLH as an independent contractor and been for the last four to five years.

[59] His evidence as to how the construction site operated was that he would assign specific tasks to the labour on site and then leave the individuals to get on with those tasks. Mr Uren said the contractors worked as a team, however, and when someone needed, for example, a second pair of hands or a fresh set of eyes at any time, that would be discussed.

[60] I accept the evidence of Mr Uren and Mr Mulholland over the extent of direction and control over Mr Oscarfono's work. It was consistent with evidence given by Mr Stephen Cummings, General Manager of McKee Fehl Constructors Limited, who has more than 30 years' experience in the construction industry. Part of Mr Cummings' evidence concerned the role of site managers on construction sites which was to deliver specific requirements on schedule. He said they worked to a set programme, delivering to quality standards, and meeting health and safety requirements as well as timeline objectives for the site.

[61] Mr Cummings' evidence, which I accept as being pragmatic and sound, was that there is no way to achieve the objectives of a construction project without a level of control or direction being exerted by the site manager.

[62] I am not persuaded the control exerted by Mr Uren indicated a relationship of employment rather than contracting: from the evidence it appeared to be no more than was necessary to ensure efficiency on the site.

[63] Turning to Mr Oscarfono's assertion that CLH and/or MC directed the times he was required to work, he said the expectation was that he work a full week at a minimum and he could not set his own hours. Mr Oscarfono said he usually worked between 7.30 a.m. and 4.30 p.m. Monday to Fridays and on Saturdays from 7.30 a.m. to 12.30 p.m. This meant he could

not undertake any other work, as he had hoped to do, while engaged by CLH and he said he would have been given his marching orders if he had tried to do so.

[64] Mr Uren denied telling Mr Oscarfono when he had to arrive at work or how long he had to stay. He said Mr Oscarfono's hours of work were up to him. Mr Mulholland said Mr Oscarfono could, and did, start and finish work at times that suited him. If he chose not to work, that was not usually a problem but, if there was an issue, it would have been up to Mr Oscarfono to talk with the site manager.

[65] Mr Uren also commented on Mr Oscarfono's claim that he was unable to take up any other work because of the expectation that he work full-time while with CLH. Mr Uren said that was incorrect and he knew Mr Oscarfono was doing work for other people because he had asked for Mr Uren's help on a job he was doing in Waikawa.

[66] Mr Oscarfono's evidence about that work was that he had helped a neighbour outside working hours, mainly on Saturday afternoons and Sundays but never expected payment for the work which he did not price or quote. He said he had told his neighbour that koha would be appreciated.

[67] The neighbour in question, Mr Brian Gore, who attended the Authority's investigation meeting by Zoom, disputed that evidence. He said he had responded to a local community Facebook page in January 2020 in which Mr Oscarfono was seeking weekend building work. This resulted in Mr Oscarfono undertaking some work for him which, Mr Gore said, took place both during the week, mainly in the afternoons, and in the weekends.

[68] Mr Gore said it was clear Mr Oscarfono was expecting payment for his work which was why he had advertised his services: he was not doing it simply to help a neighbour. Mr Oscarfono had not completed the work, for reasons that are not relevant to this matter.

[69] I am not persuaded that Mr Oscarfono's hours of work were prescribed in the way he claimed and prefer Mr Uren and Mr Mulholland's evidence that he could start and finish when he chose, although that would be tempered by the need to ensure the site was run efficiently. In the course of the Authority's investigation meeting Mr Oscarfono acknowledged that he usually arrived on site before Mr Uren did and that, if he worked on Saturday mornings, it was by his choice and not because he was directed to do so.

[70] Nor do I accept Mr Oscarfono's claim that he was unable to undertake any work outside his contract with CLH because of the hours he was required to work. Taking into account the difficult and challenging year Mr Oscarfono said he had in 2019, when he did not work, and his eagerness to start work immediately after being offered a contract with CLH, I consider it more likely he worked regular hours because he wanted to do so.

[71] A further factor that Mr Oscarfona claimed made him feel like an employee was the MC uniform he said he was required to wear at all times while performing his duties. He said people who were contracted through CLH to work for MC were not automatically given a uniform to wear but, when they proved themselves, they were initiated as part of MC's core team and given t-shirts and a sweatshirt carrying MC branding, which they were expected to wear. Mr Oscarfono referred to this as being "patched up" by Mr Mulholland.

[72] Approximately two months after starting work, according to Mr Oscarfono, he went to Mr Mulholland's office to ask for a pay rise of \$4.00 per hour. After checking with the site manager of the residential construction site where Mr Oscarfono was working, Mr Mulholland agreed to the request. When Mr Oscarfono then raised the issue of the t-shirts that other workers on site were wearing, he said Mr Mulholland told him they were for "the patched-up members". Mr Mulholland gave Mr Oscarfono three t-shirts and a hoodie telling him he was now a "fully patched member".

[73] Mr Mulholland denied Mr Oscarfono was required or expected to wear a uniform. He said CLH had no uniform and did not require contractors to wear one. Within limits, which mainly concerned safety, they were free to wear what they liked on site. He said MC had some branded t-shirts, which were primarily for publicity and were not a uniform. He confirmed he had given some to Mr Oscarfono. Under questioning in the Authority hearing, Mr Mulholland said he may have joked to Mr Oscarfono when giving him the clothing that "you're here for life".

[74] Mr Uren said he had never been told he had to wear MC clothing: he wore it sometimes, because it was "nice gear" but not all the time. Mr Uren disagreed that Mr Oscarfono was not permitted to wear his own gear if had wanted to. He recalled a bit of banter from others on the worksite about Mr Oscarfono being "patched" when he first wore the MC branded clothing, but said it was nothing more than banter.

[75] I find Mr Oscarfono's claim about being required to wear a uniform at all times when on site to be implausible. He first raised the subject of MC branded clothing with Mr Mulholland after he had been working for approximately two months by his evidence. By this time, he was on his third assignment from CLH, and on the third work site managed by MC.

[76] Mr Mulholland's offer of some of the MC branded clothing was made only after Mr Oscarfono had expressed interest in it and asked questions about it. If the clothing was a uniform that CLH or MC required to be worn at all times when working on an MC site, I find it is far more likely that Mr Mulholland would have raised this with Mr Oscarfono either at the interview stage or when he was offered his first assignment. I am not persuaded Mr Oscarfono was required to wear a uniform.

[77] A further matter Mr Oscarfono raised was that, following the start of the lockdown, and without his knowledge or consent, CLH claimed the wage subsidy for him on the basis that he was an employee. It was not paid to him and Mr Oscarfono was left in financial difficulty until 15 April when, as noted earlier, he received the subsidy for a self-employed contractor.

[78] Mr Mulholland denied applying for the wage subsidy for Mr Oscarfono and said CLH had contacted all contractors to suggest that they apply for the subsidy. However, he also said CLH also applied online for its employees and that an incorrect list was used by a staff member when doing. Mr Mulholland said that resulted in his spending a lot of time trying to rectify the situation and refund the monies incorrectly received by CLH.

[79] Mr Oscarfono's name was included on that incorrect list which resulted in the applications he made for the subsidy being rejected initially. It was clearly a very unfortunate situation for Mr Oscarfono to be in through no fault of his own but I accept from the evidence before me that his inclusion on a list of employees was an error. I do not find it supports his claim to have been an employee.

[80] Other matters relevant to Mr Oscarfono's claims of being an employee are the confusion he professed over the distinction between CLH and MC. Mr Oscarfono said he could see no difference between the companies. He acknowledged in the course of the Authority's hearing that CLH paid the remuneration he received, and that it was CLH he contacted when he had a query about a record of a payment that he had not received.

[81] As I have already noted, Mr Mulholland is the sole director of both companies, which may have contributed to Mr Oscarfono's difficulty in recognising the different roles each company played. I am satisfied there was no evidence to suggest Mr Oscarfono had ever been remunerated by MC or that it played any part in his time with CLH other than as a client of CLH for which he undertook assignments.

[82] The final question to be answered in determining whether Mr Oscarfono was in reality an independent contractor or whether he was an employee is whether he was in business on his own account when undertaking the contract with CLH.

[83] The brevity of the relationship makes any proper assessment difficult. There is evidence from Mr Gore of Mr Oscarfono seeking external work in January 2020 by means of a community Facebook page and of undertaking work for Mr Gore which was not completed. I have found he was not required to set hours of work with CLH and could have chosen external work over CLH assignments.

[84] I have found Mr Oscarfono could accept or reject assignments offered to him and could choose the times he wished to work. These factors indicate that he was in business on his own account.

[85] Factors indicating otherwise are that, under his contract with CLH, Mr Oscarfono could not substitute a subcontractor for himself in any assignment without the written permission of that company. There was no evidence that Mr Oscarfono sought to substitute a subcontractor for himself at any stage during his short experience with CLH so it is not possible to assess the likelihood of the company agreeing to such a proposal.

[86] Under the terms of the contract he stood to profit from, or risk a loss, only if he accepted an assignment for a fixed value rather than for an hourly rate. Again, there is no evidence that CLH offered work under that provision, or that Mr Oscarfono sought to utilise it at any point.

[87] While the evidence is mixed, Mr Oscarfono's background and familiarity with contracting and with operating his own business, together with the alacrity with which he entered into a contractual arrangement with CLH persuades me he intended to be, and was, in business on his own account although he did not reap all the benefits he may have envisaged.

Did the relationship evolve over time?

[88] Mr Oscarfono's engagement with CLH lasted approximately three months before the first national lockdown brought an end to work for several weeks. After the lockdown he returned to the worksite for less than two weeks before leaving on 8 May 2020.

[89] That is a very short timeframe for a relationship to evolve and there was no convincing evidence that Mr Oscarfono's relationship did in fact evolve. I discerned from the answers he gave to questions put to him in cross examination that the main issue for Mr Oscarfono was that of invoicing. As that was an issue he had talked about with Mr Mulholland on 11 December 2019 before he signed the CLH contract, it was a situation he had known about from the outset. It was not a situation that evolved over the period of the relationship.

[90] I find the relationship remained throughout as it was from the outset. It did not evolve over time into some other form.

Conclusion

[91] After considering all the evidence and submissions of the parties I have rejected all but one of the claims Mr Oscarfono made to support his view that the real nature of his relationship was one of employment, and that MC was his employer or one of them. Those claims include ones that impact on the amount of control exercised over Mr Oscarfono in the working relationship, such as his ability to accept or refuse an assignment, the times he worked, how he went about his work, and whether he was free to take up work outside his contract with CLH.

[92] The claims I have rejected also include those affecting the issue of whether Mr Oscarfono was integrated into CLH's or MC's businesses. His claim regarding the requirement to wear an MC uniform fits into that category. I find no evidence to support such integration.

[93] I have found one of the factors he raised gives rise to concern: that is regarding invoicing CLH for the work he undertook. I have accepted Mr Mulholland's evidence that he told Mr Oscarfono he could invoice CLH monthly but would be also be paid monthly. I have found, however, that did not reflect the contract Mr Oscarfono signed, which provides for weekly payment whether a contractor provides an invoice or not.

[94] That factor is not sufficient on its own to persuade me that the relationship was in reality one of employment.

[95] I have rejected Mr Oscarfono's claim that the relationship may have started out as a contracting relationship but evolved into one of employment for lack of evidence, and on the basis that the brevity of the relationship was insufficient for such an evolution to become apparent.

[96] I am satisfied Mr Oscarfono entered an independent contracting relationship with CLH in the knowledge of what such relationships entailed. After examining the reality of the relationship, I conclude it was in practice a true independent contracting relationship and not a relationship of employment.

[97] As I have found Mr Oscarfono to be a contractor I have no jurisdiction to consider his claims further.

Costs

[98] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[99] If they are not able 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 Oscarfono will 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.

[100] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Trish MacKinnon
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1