

**Attention is drawn to the
order prohibiting publication
of certain information in this
Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 521
3129476

BETWEEN	WTW Applicant
AND	JOHNS ROAD INVESTMENTS LIMITED First Respondent
AND	NEIL STANLEY BLAIR Second Respondent

Member of Authority: Helen Doyle

Representatives: Chrissy Gordon, advocate for the Applicant
Hugh Matthews, counsel for the First and Second
Respondents

Investigation Meeting: 3 and 4 August at Christchurch

Submissions Received: 4 August 2022 from the Applicant
4 August 2022 from the Respondents

Date of Determination: 11 October 2022

DETERMINATION OF THE AUTHORITY

Application for non-publication of name by applicant

[1] The applicant seeks non-publication of their name. The ground advanced for the application is that they are the subject of a District Court protection order against a family member. They are concerned that knowledge of these proceedings may attract that person's attention.

[2] The respondent neither opposes nor supports the application.

[3] The Authority has a discretion to make orders for non-publication in clause 10 of the second schedule of the Employment Relations Act 2000 (the Act). The discretion is to be exercised on a principled basis. It is a fundamental principle that justice should be administered openly. A party seeking to depart from that is required to provide evidence identifying specific adverse consequences that mean a non-publication order is appropriate.¹ I have weighed the applicant's concerns with the principles of open justice. The respondent has adopted a neutral position. I have been shown a copy of both the interim and final protection orders made by the District Court.

[4] Taking all factors into account I am satisfied it is in the interests of justice to grant the order for non-publication of the applicant's name. There could be adverse consequences that flow from the applicant's name being published in all the circumstances.

[5] I order that the applicant's name is not published. I shall refer to the applicant as WTW which is a random computer-generated string of letters.

Employment relationship problem

[6] WTW has asked the Authority to determine the nature of their relationship with the first and/or second respondent during the period managing a property at Johns Road, Christchurch from or in and about 2000 to 5 December 2019.

[7] If WTW is found to be an employee, then WTW says their employment was terminated unjustifiably and they were not paid in accordance with the Minimum Wage Act 1983 and did not receive statutory entitlements under the Holidays Act 2003.

[8] If WTW is found to have been engaged as an independent contractor by either the first or second respondent, then the Authority has no jurisdiction to deal with their claims including the personal grievance.

[9] The application was lodged with the Authority on 22 December 2020. In the statement of problem WTW seeks minimum wage calculations from 2014 to 5 December 2019 when the relationship ended in the sum of \$91,950 based on 20 hours of work being undertaken per

¹ *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

week. WTW also seeks payment of annual leave entitlements for the entire period from 2000 to 5 December 2019 in the sum of \$19,460. These claims were amended at the time of final submissions which I will address if the point is reached where remedies are considered. There is no claim for lost wages. There is a claim for compensation.

[10] Penalties were claimed for breaches of the Minimum Wage Act 1983, the Holidays Act, and the Act. Ms Gordon advised at the start of the investigation meeting that claims for penalties were withdrawn.

[11] Johns Road Investments Limited (Johns Road) and Neil Blair say that WTW has never been an employee of Johns Road or Mr Blair but was engaged as an independent contractor to act as a property manager for Johns Road.

The investigation process

[12] The Authority heard evidence from WTW and a friend Pamela. WTW's brother who had lived in a house at the Johns Road property during the material time provided a witness statement. He was not able to attend the Authority investigation meeting because of illness. It was agreed that his statement could remain for consideration by the Authority. The Authority heard from Mr Blair, the sole director of Johns Road.

[13] On the second day of the investigation meeting the Authority concluded the evidence and then heard submissions.

The issues

[14] The Authority needs to resolve the following issues in determining the real nature of the relationship between WTW and Johns Road and/or Mr Blair.

- (a) What is the legal framework for assessing the real nature of the relationship?
- (b) What was said by the parties about their intentions for their relationship?
- (c) How did the relationship work in practice?
- (d) What was the level of control over WTW during the relationship?
- (e) Was the work performed by WTW an integral aspect of the business?
- (f) Was WTW in business on their own account?

- (g) What assistance can be obtained by an assessment of industry practice?
- (h) If WTW is an independent contractor, then the Authority lacks jurisdiction to deal with their claims.
- (i) If WTW was an employee who was the employer?
- (j) Is WTW owed wages and holiday pay and, if so, in what amount?
- (k) Was WTW unjustifiably dismissed?
- (l) If a personal grievance is established, what remedies should flow and are there issues of contribution?

What is the legal framework for assessing the real nature of the relationship?

[15] The relevant provision in the Act is s 6 and the material aspect is set out below:

6. Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee**—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[16] The Supreme Court has provided guidance as to all relevant matters.² It stated in a judgment which upheld the decision of the Employment Court:

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of the 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* No. 2 [2005] ERNZ 372 at [32] (SC).

It is important that the Court or 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 account (the fundamental test), which were importance determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it has actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration, and fundamental test ...

What was said by the parties about their intentions for their relationship?

[17] Initially Mr Blair’s brother was involved in managing the property for a Family Trust. Johns Road was incorporated in 2017 because it was considered a management company should be put in place with leases in its name. The evidence supported that WTW was aware of the involvement of both the Family Trust and then Johns Road in owning and operating the property.

[18] WTW was living in a bus on the property in 2000 with their then partner. They were paying rent of \$65 for a site.

[19] At that time a tenant called George kept an eye on the property and was informally the “eyes and ears” of Mr Blair’s brother who did not live on the property. George was not paid and there was no adjustment to his rent. After George left, there was a discussion with WTW and their partner about them taking on a property management type role. There was an agreement to pay them \$2,000 per quarter and they continued to live in their bus and pay rent for their bus site.

[20] The evidence did not support a common intention about the relationship at the time it commenced. There was nothing in writing about the nature of the relationship until 28 July 2019. On that date Mr Blair provided a lengthy email in response to a query from WTW about holiday pay and advice they had contacted the Ministry of Business, Innovation and Development (MBIE). In the email Mr Blair described the relationship as a contracting one. Mr Blair said in his evidence that he had always considered WTW was an independent contractor.

How did the relationship work in practice?*Johns Road property*

[21] The Johns Road property was purchased around 1981 when it was the remains of a farm after subdivision. It contained at that time two farmhouses, farm sheds and a barn that has since been demolished. The three larger sheds were converted into 20 storage units. The dairy shed was closed in. In addition to the two farmhouses a one-bedroomed cottage was added in 2014 and WTW lived in that property.

[22] The caravan park on the property was throughout the material time leased to motels who managed and maintained that area of the property as part of their lease from Johns Road. The caravan park rent was paid directly by the motels to Johns Road.

[23] The two farmhouses that were tenanted were referred to in evidence as the Brick house and the White house. The White house has an additional sleepout. The tenants of these properties were responsible for the maintenance of their grounds. There were also tenants who lived on the property and occupied buses and caravans. There were some long-term tenants and some short-term tenants.

[24] An area south of the White house was leased by a caravan rental business for the past seven years. The caravan rental business was responsible for maintaining the area and mowing the lawns.

[25] There is also an area that is paddocks. The paddocks were initially leased to a farmer for grazing but from 2014 onward there was a period when there was no farmer leasing that area. Whilst leased the paddocks were maintained by the farmers.

On site manager

[26] WTW said in evidence that they were known as the property manager and there was advice given to prospective tenants in emails in the bundle that Johns Road had an on-site manager.

[27] I accept that there would be a benefit to Johns Road in having an on-site manager and that WTW was held out of such. Mr Blair said in his evidence that there was no expectation that WTW would be available on site 24 hours a day rather that they be contactable. He said

in his evidence that whilst it was an advantage to have someone on site he did not need that and had closed circuit television.

Nature of the work undertaken by WTW

[28] There was considerable evidence about the tasks undertaken by WTW and the time required to undertake the work. Broadly the nature of the tasks were as follows:

- (a) Clearing out the sheds when they were vacated - sweeping out and disposing of rubbish.
- (b) Advertising for new shed tenants - Mr Blair put the annual turnover at five or six sheds per years. I accept that was variable however the evidence supported several longer-term tenancies for the sheds.
- (c) Mowing other than the paddocks. This was described as the mowing of the strip of grass on either side of the driveway along with the areas in front of the dairy shed and storage units. Johns Road provided a large ride-on mower for that. As set out earlier the tenants in the house did their own mowing.
- (d) Cleaning the two houses and arranging for new tenants. The evidence supported reasonably limited change of tenants in the two houses. I accept there had been some unsettled periods.
- (e) Weed spraying two or three times a year.
- (f) Weekly check of the bank statement to ensure tenants were paying rent on time and chasing up rent when required.
- (g) Tenancy tribunal appearances (ten of these for the entire period with one in 2007, two in 2009, one in 2013 and six in 2015).
- (h) From earlier 2019 WTW read four electrical power metres each month.

[29] WTW referred to some additional tasks. There would have from time to time been a requirement to call out a tradesperson such as an electrician or plumber to make some repairs. Further, there may have been some minor repairs that could have been carried out without the need to call a tradesperson. There was reference to organising the septic tank cleanout. Mr

Blair said that only happened about once every five years and required a telephone call to organise. WTW referred to removing a fallen tree that had destroyed an old shed. There was a dispute about whether WTW wanted this for firewood or not. There was an email from WTW to Mr Blair dated 19 September 2011 that referred to four weeks free rent being given to Barry and Gail who helped clean up after the trees came down and did other work. There may have been other tree issues.

[30] WTW referred to work on properties that they occupied. Some of this work was to improve the property for WTW. Mr Blair's evidence was that some required work at the relocatable cottage was undertaken and paid for by Johns Road. This is supported by some documents in the bundle of documents. Upon termination of the tenancies there was also a deed entered into between WTW and Mr Blair as director for Johns Road that amongst other matters provided a payment to WTW for all improvements made to the cottage and the veranda.

[31] It was accepted that over the period that WTW managed the property there were some occasions when the police/ fire service was called to the property. Mr Blair described these as rare. My impression from the evidence was these visits may have occurred more frequently some years than others. There was a dispute as to how often WTW would need to contact Mr Blair. Mr Blair said calls about tenants were infrequent and perhaps no more than one or two a month. WTW's evidence was that contact was more frequent. There were also some email exchanges as well.

[32] The reference to insurance issues appeared to relate to the earthquake issues. Mr Blair was involved in settling these directly with the earthquake commission and insurance company. WTW may have met with those undertaking assessments or contractors who were required to complete repairs.

[33] There was some evidence about mowing the open paddocks. It was Mr Blair's evidence that the open paddocks were only mowed twice and there was the hiring of the tractor and attached mower to undertake that work. Mr Blair understood the work was undertaken by persons other than WTW. I conclude that is likely from the evidence.

Changes in the arrangements in 2007

[34] In or about 2007, WTW separated from their partner. The White house was vacant and there was an agreement that WTW would move into the White house and manage the property. The payment changed from \$2,000 to \$1,000 per quarter to reflect that WTW was occupying the White house. Whilst in the White house WTW could and the evidence supports did take on other tenants in the house and sleepout.

[35] Around 2012 Mr Blair discussed with WTW that he was losing too much income with them staying in the White house. He proposed buying a relocatable or small cottage to live in if they continued managing the property. WTW accepted that suggestion.

Changes in the arrangements in 2014

[36] From 2014 WTW occupied the cottage that had been delivered to the Johns Road property rent free. Mr Blair said in evidence that it could have been rented for \$250 per week and was at the time of the Authority investigation meeting rented out at \$280 per week. Johns Road paid the power for the cottage and for a time until about August 2019 WTW had storage in a shed worth \$60 per week.

[37] The evidence supports that some other tenants had taken on some work for WTW including mowing the lawn and spraying weeds from time to time. A couple of the tenants were handypersons and able to undertake some minor repairs. The quarterly payments to WTW did not change throughout. Some emails from WTW to Mr Blair support that when help was provided to WTW credits were given to these tenants for rent and/or they received other benefits such as the use of a shed.

[38] There is a letter from one of those tenants Rex included in the bundle. In the letter Rex confirms that after another tenant Peter ceased to be the handyperson around the property for WTW, he took on the role. He set out this included mowing lawns, occasional brush cutting, weed spraying along the fence line once or twice a year, sweeping and clearing out sheds that were vacated and some minor repairs. He wrote that most time was taken during Spring when the lawns grew. He averaged over the year that he would not spend more than one to one and a half hours undertaking this work and offered to do it on a contract basis for \$35 per week.

Health issues

[39] In or about 2015 or 2016 WTW had some quite serious health issues and was unable to perform some of the more physical duties of the role such as mowing and weed spraying. Their brother had moved into the White house in 2017.

[40] WTW decided to use him for the maintenance instead of Rex and he took on the job of lawn mowing and weed spraying for a reduction in his rent of \$100 per week. When WTW raised that he needed a greater allowance he was allowed to have the use of a shed valued at \$60 per week. Mr Blair said that he considered the hours required to perform these tasks was somewhat exaggerated but took no issue at the time.

[41] Sometimes WTW's brother would carry out other specific maintenance work and was paid and/or credited for that work

[42] For much of the time that WTW was property manager Mr Blair was in Australia. The evidence supported that there were periods up to five or six years between him returning to New Zealand for a visit to the site,

Hours required to undertake the tasks

[43] There was dispute about the hours WTW worked in the role.

[44] WTW said in oral evidence that they worked from "daylight to dusk".

[45] Mr Blair in his email of 28 July 2019 put the time for the role at 200 hours per annum although that was exclusive of the more physical tasks such as lawn mowing that WTW's brother was undertaking at that time.

[46] When a personal grievance was raised on 10 December 2019 Ms Gordon stated in her letter that a conservative approach to calculating WTW's hours had been taken and the claim was based on 30 hours per week.

[47] In the statement of problem calculations were based on 20 hours per week and in final submissions there were calculations for 20, 15 and 10 hours of work.

[48] Mr Blair has been managing the property for the 18 months before the investigation meeting. He said that the office type tasks take him about half to one hour per week and the mowing, spraying and trimming takes his wife about one hour per week.

[49] Some of the tasks were ongoing and regular in nature, but some were one off type incidents that had occurred at a point in time over many years.

[50] I do not find the evidence supports the tasks required WTW to work full time but rather conclude the evidence supports it was a part time activity with no days or hours required or expected for routine tasks. I accept that there may have been unexpected events that required attention. The Inland Revenue records support that over the years WTW undertook work elsewhere off site for several employers and at times was in receipt of a benefit.

[51] No record of time spent on tasks WTW undertook was kept or required to be kept. I conclude having considered the evidence it is likely the work averaged out was not more than 10 hours per week. When the more physical duties were undertaken by others the number of hours worked would have decreased.

Holidays and time away from the property

[52] WTW agreed that there was time off the property for holidays. There was no evidence to support the need to obtain leave for such an arrangement however it is likely holiday time off the property was notified to Mr Blair.

Issues raised about the relationship

[53] WTW said that they would raise issues every so often about a pay rise and holiday pay. Mr Blair said that the first time any issues was raised about the nature of the relationship and holiday pay was in 2019. Mr Blair said that he discussed issues about GST with WTW but WTW denied that. WTW says that there was no mention of the relationship being a contracting one until 2019.

Taxation

[54] No tax was withheld or paid on money received.

Ending of the relationship

[55] In 2019 WTW was aware that Mr Blair was considering taking over the management of the caravan park and asked whether they could have a position running it. In the email of 28 July 2019 Mr Blair concluded that the requirement of high-level bookkeeping skills, and

someone in good health made it difficult for WTW to satisfy the criteria to manage a growing caravan park. There had also been some concern over the management of payments by tenants.

[56] WTW raised issues about their status and holiday pay with Mr Blair and MBIE. Mr Blair responded in the email of 28 July 2019.

[57] By letter dated 4 September 2019 Mr Blair gave WTW notice of termination of the contract of three months on the basis that the services that had been provided could be undertaken either remotely or by others on site. The contract was stated to end on 5 December 2019 and that during that period the contract fee would be paid but there was no requirement to undertake the services. It was stated that Johns Road would take over the services and management themselves.

[58] As Ms Gordon submits it is not clear what if any discussion took place prior to the relationship commencing. There were no written terms of agreement. To determine the real nature of the relationship it is necessary to consider the features of control, integration, and the fundamental test.

What was the level of control over WTW?

[59] Ms Gordon submits that WTW was working under the full control of Johns Road and/or Mr Blair. She submits that WTW was given a budget and a list of tasks to be performed. Further that they were authorised to represent the company and/or Mr Blair at the Tenancy Tribunal but needed permission before any purchase and could not make major decisions about the property.

[60] WTW was asked to carry out duties. That factor itself does not necessarily point towards an employment relationship. The evidence as to how and when those duties would be performed does not support a significant level of control was exercised. I accept Mr Matthews submission that there was a level of flexibility and autonomy about that. There are emails in the bundle of documents that support WTW made decisions including giving some tenants free rent for a period in exchange for maintenance assistance. Mr Blair was in Australia for most of the period. There were only occasional visits by Mr Blair to New Zealand and otherwise phone or email communication. There was only very limited supervision.

[61] An example of the level of control is evident from an occasion when money for a bond paid by a tenant had not been deposited by WTW. This was not picked up by Mr Blair until the tenant complained. In an email WTW accepted using some of the bond money for their own use. It was then repaid.

[62] WTW was also able to arrange for others to undertake parts of the work from time to time and particularly from about 2015 when they were quite unwell.

[63] In conclusion WTW exercised autonomy over her work and there was flexibility in how and when it was performed for the most part. There was limited control. This points away from the real nature of the relationship being one of employment.

Integration

[64] Under this test the Authority considers if the work done is an integral aspect of the business or if the work, although done for the business is not integrated into it but is an accessory to it.

[65] WTW was seen as the property manager, had been undertaking that role for a long time and lived on site.

[66] Weighed with that the role was part-time and limited. It was able to be performed when WTW undertook part or full-time employment as they did from time to time over the years. WTW said that they were required to attend to emergencies at site even if undertaking another role. I could not be satisfied that these occurrences were frequent.

[67] Aspects of the duties such as mowing could be and were on occasion undertaken by others onsite. WTW was not always on site. WTW accepted for example in 2007 when questioned by Mr Matthews that they lived off site for a time and paid rent elsewhere. Tenants could and did communicate directly with Mr Blair although WTW expressed some unhappiness about that.

[68] When I weigh these matters and how the relationship operated in practice, I am not satisfied that the integration factors support a relationship of employment.

Fundamental test

[69] Ms Gordon submits that WTW was not operating a business, was not GST registered and not in a position to profit from the work undertaken.

[70] WTW was provided with most of the tools and equipment required to undertake the work such as the ride on mower. They did have a few personal tools. That could point towards a relationship of employment. There was no GST registration.

[71] There was an opportunity to profit in the respect that WTW could arrange for others to undertake their duties. WTW still retained the benefit of rent-free accommodation, power paid and the same quarterly payments when duties were delegated to others to perform. No issue was taken about this by Johns Road or Mr Blair. This aspect to a relationship other than employment.

[72] Taxation was not deducted from WTW's quarterly payment.

[73] WTW was paid for completion of the duties and did not receive wages for time worked. There was no time recorded for the work undertaken.

[74] There are some factors under this test that favour employment however viewed overall more factors point away from employment particularly the delegation of duties without reduction in payment and the payment for completion of duties rather than time worked.

Industry practice

[75] There are property management services provided by companies acting as independent contractors. Mr Blair asked one such company to visit the site and provide the fee for managing the property. His evidence was that the proposed management fee and the quote from Rex for maintenance together were about half the cost of what WTW was receiving with the rent-free accommodation, free power, and the quarterly payment. With that though I weigh the benefit of having an on-site person.

[76] I consider industry practice is a neutral factor because property management could be undertaken by employees or independent contractors.

Conclusions

[77] The relationship between WTW and Johns Road/Mr Blair was a long one but was not reduced to a written agreement. It is more likely that it was only towards the end of the relationship that WTW raised issues about the nature of the relationship.

[78] I have not found a common intention between the parties about the nature of the relationship. The control test favours a contracting relationship. I have not found that the integration test on balance establishes work done as an integral part of the business and the fundamental test supports a contracting relationship.

[79] I am satisfied that the real nature of the relationship WTW had with Johns Road and/or Mr Blair was as a contractor and not as an employee.

[80] The result of this is that the Authority does not have jurisdiction to consider the claims of WTW for a personal grievance, minimum wages or holiday entitlement.

[81] Mr Matthews provided a table of indicia as part of his submissions from an Employment Court judgment in *Barry v C I Builders Limited*.³ I have attached it to the determination as appendix 1. It provides a useful summary about the conclusions reached about the relationship where applicable.

Costs

[82] I reserve the issue of costs.

[83] If costs cannot be resolved, then Mr Matthews may lodge and serve a costs submission within 14 days from the date of this determination.

[84] Ms Gordon will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs.

[85] Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

³ *Barry v C I Builders Limited* [2021] NZEmpC 82.

[86] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.⁴

Helen Doyle

Member of the Employment Relations Authority

⁴ Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>.

Appendix 1

Indices	Employee	Independent contractor
Does the hirer have the right to exercise detailed control over the way work is performed, so far as there is scope of such control?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Is the worker integrated into the hirer's organisation?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Is the worker required to wear a uniform and/or display material that associates them with the hirer's business?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Must the worker supply and maintain any tools or equipment?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Is the worker paid according to task completion, rather than receiving wages based on time worked?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Does the worker bear any risk of loss, or conversely have any chance of making a profit from the job?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Is the worker free to work for others at the same time?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Can the worker subcontract the work or delegate performance to others?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Is taxation deducted by the hirer from the worker's pay?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Does any business goodwill accrue to the hirer?	<input type="checkbox"/>	<input type="checkbox"/>
Does the worker receive paid holidays or sick leave?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Does the agreement describe the worker as an independent contractor?	<input type="checkbox"/>	<input type="checkbox"/>