



[2] Susan Thorpe has a MA in Archaeology and has over 28 years of experience as an archaeologist both in New Zealand and internationally.

[3] Ms Thorpe was engaged by the Trust to undertake a range of work for it from late 2009. The work undertaken by Ms Thorpe was significant and an essential part of the revitalisation of the Trust through 2010 and onward.

[4] In November 2021, a dispute arose over the scope of the work Ms Thorpe was engaged to undertake for the Trust, with some parameters and restrictions on that work being imposed by the Trust. This led to Ms Thorpe raising a personal grievance for unjustified action causing disadvantage and she lodged a statement of problem in the Authority.

[5] The Trust says Ms Thorpe was (and still is) an independent contractor to the Trust and as such I do not have jurisdiction to investigate her claim.

### **The Authority's investigation**

[6] The parties agreed that I would determine Ms Thorpe's status in relation to the Trust as a preliminary issue.

[7] I investigated this preliminary issue by receiving written evidence and documents, holding an investigation meeting on 6 and 7 December 2022 and assessing the written submissions of the parties' representatives.

[8] In my investigation meeting, under oath or affirmation, each witness confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[9] After my investigation meeting the parties' representatives provided written submissions.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my

findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **Ms Thorpe's engagement with the Trust and the work she did for it**

[11] In August 1989, Ms Thorpe established a company, Kotuku Consultancy Ltd. Ms Thorpe described it as being a research company to carry out archaeological and ecological work. However, from its formation, Kotuku was used sparingly for Ms Thorpe's consultancy work for various reasons, including time pressures from parenting commitments and volunteer work and some work being undertaken as an employee.

[12] From 2006 Ms Thorpe, through Kotuku, undertook some consultancy work for the Trust; this work comprised specific project based work for which Kotuku was paid an agreed project job cost.

[13] In 2009, Maui Solomon, Ms Thorpe's husband, took on the responsibility of managing the Trust out of a difficult financial position it was in and also revitalising it in terms of its purpose and role for Moriori. I received clear and compelling evidence about the state of the Trust and the nature of the task Mr Solomon undertook when he stepped up to rescue it; the evidence also touched on how the Trust developed and evolved as a result of this work and ongoing efforts, during the time Ms Thorpe was engaged by the Trust. This evidence provided invaluable context for how Ms Thorpe's role with the Trust began and evolved.

[14] Ms Thorpe and Mr Solomon moved to Rēkohu in late 2009 to be able to fully undertake the work required for the Trust. Ms Thorpe began working on Trust related work in January 2010, on a full-time basis.

[15] When Ms Thorpe started working for the Trust there were no formal terms of engagement either in an employment agreement or a contractor agreement. Nor was there a document outlining the role Ms Thorpe was undertaking, such as a job description or

contractor schedule of tasks and performance expectations. However, Ms Thorpe did sign a confidentiality agreement.

[16] Initially Ms Thorpe's work for the Trust was in two parts:

- (a) Maintenance and administrative work – this area of work was broad ranging and essentially about rebuilding many of the practical aspects required for day-to-day operation of the Trust. This included cleaning and repairing Trust property, gardening, and sorting and filing Trust documents.
- (b) Project work – this was work on projects for the cultural revival of the Trust. Initially Ms Thorpe worked on existing projects, checking and reporting on them, progressing grant applications in relation to them and advancing the project work.

[17] Over time Ms Thorpe's work for the Trust developed. Broadly it fell into three parts:

- (a) Office and marae management – this covered a range of tasks including cleaning, providing tours, preparing food and cooking meals, briefing staff, dealing with mail and correspondence, administrative matters for staff and the Board of the Trust (the Board), arranging operational matters such as transport and gifts, instructing and managing contractors, and Board minutes. This work – both the type of work and the amount of it – varied significantly each month.
- (b) Cultural projects, including funding/grant applications and managing and implementing the projects.
- (c) Treaty claims from 2016 – this work was paid directly by the office of treaty settlements for the Moriori Settlement Trust.

[18] Ms Thorpe says her work for the Trust was set by direct instructions from the CE/GM – Ms King and then Mr Solomon – or the Board. She says the Board's instructions arose

from its strategic planning and budgeting in terms of identifying and supervising work she did on cultural projects. It appears that much of the day-to-day work undertaken by Ms Thorpe was determined by her based on what she was tasked with doing.

[19] Ms Thorpe generally worked 40 or more hours per week on her work for the Trust but these hours were not completed in a regular shift pattern. Ms Thorpe worked hours depending on the task she was completing or her own assessment of when and how she would do the work. There was no agreed number of hours of work nor was there set times such as Monday to Friday at particular times. Ms Thorpe kept her own record of the time she spent working on Trust work, which included the time and the tasks undertaken. Ms Thorpe then billed the Trust through Kotuku on a monthly basis for the hours she had worked. Ms Thorpe had three hourly rates depending on the type of work she was completing; one for admin work, one for project work and one for treaty settlement work. The Kotuku invoices also included GST and any disbursements or expenses.

### **Assessment of Ms Thorpe's status**

#### *The issues*

[20] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Act.

[21] The leading case on how the Authority or the Court should apply s 6 of the Act, is *Bryson v Three Foot Six Ltd*.<sup>1</sup>

[22] The traditional approach to assessing the status of a worker, based on *Bryson* and subsequent decisions of the Employment Court, includes:<sup>2</sup>

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<sup>1</sup> *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC) and *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34

<sup>2</sup> *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.

- (a) Considering the terms of engagement between the parties to establish if there is a common intention, which may indicate the nature of the relationship but will not be determinative.
- (b) Considering how the work was then carried out in practice, looking for divergences from the agreed terms of engagement.
- (c) Then, based on how the work was carried out in practice applying three relevant common law tests:
  - (i) Control, being an analysis of who decides what work is done and how it is done;
  - (ii) Integration, being an analysis of how integrated the individual is into the business of the alleged employer; and
  - (iii) The fundamental test, being an analysis of whether the individual is in business on their own account.
- (d) Considering industry practice, noting this is relevant but not determinative.

[23] In recent cases the Employment Court has considered how to apply these factors given the changing nature of New Zealand's work force and working conditions.<sup>3</sup>

[24] The Court's approach has focussed in on whether the individual served their own business or the hirer's business. The question asked is whether the individual worked within the hirer's business to enable the hirer's interests to be met or whether the individual was an entrepreneur providing their labour to the hirer to make gains for their own entrepreneurial

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<sup>3</sup> *Leota v Parcel Express Ltd* [2020] NZEmpC 61; *Barry v C I Builders Ltd* [2021] NZEmpC 61; *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230; and *E Tu Inc v Rasier Operations BV* [2022] NZEmpC 192.

enterprise.<sup>4</sup> The emphasis being on understanding for whose benefit, in a commercial sense, the work is undertaken – for the hirer or for the worker.

[25] To assist in assessing this the Court also posed indicia which it considered to be relevant, although to varying degrees depending on the particular circumstances.

*Applying the various tests*

[26] The difficulty with this case is that an approach that focuses on entrepreneurial business activity and commercial benefits, does not align with either the Trust's or Ms Thorpe's primary purpose or goal or the way in which they operated during the relationship.

[27] As stated, the Trust's purpose is to represent Moriori wherever they may live and to advance Moriori health, welfare and education. The Trust is not a commercial enterprise seeking to make profit from goods or services it provides. It is akin to a social business enterprise. Its operations include managing funds and assets in the region of \$85 million. In doing this, the Trust says it operates in a way that honours the legacy of the members' ancestors by applying the wisdom and values of the past and it bases its business and strategic planning around the core Moriori values of unity, sharing and listening.

[28] It appears that Ms Thorpe's work with the Trust was not about creating or growing an entrepreneurial endeavour.

[29] Much of Ms Thorpe's initial work was related to re-establishing the Trust and done in conjunction with Mr Solomon's work, after they both moved to Rēkohu

[30] In doing this work, Ms Thorpe essentially assumed the role of a senior manager and it suited the Trust to allow her to operate with a significant amount of autonomy. In the early part of her tenure, before the Trust had a more established management structure, Ms Thorpe's role was similar to a Chief Operating Officer with a range of operational responsibilities. Later as her role developed and the Trust's operating structure became more

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<sup>4</sup> *Leota* above n 3 at [38]; and *Barry* above n 3 at [3].

established Ms Thorpe's management role covered cultural projects and office and marae management.<sup>5</sup> In the last part of her tenure Ms Thorpe's role has been management of cultural projects.

[31] What the evidence in this matter shows is that there was never a clear mandate given to Ms Thorpe for her role, such as a detailed job description for a senior manager or specifications of the parameters and expected outputs for a contract role. Ms Thorpe's role in the Trust evolved with what she identified as being the Trust's needs and goals in the areas she worked on. And Ms Thorpe lived and worked on Rēkohu being assimilated in the Moriori community through her work with the Trust, her marriage to Mr Solomon and her social and community endeavours.

[32] So in this case:

- (a) The relationship for each party is not primarily about establishing and furthering a profitable commercial or entrepreneurial enterprise, but rather work that is done as part of a wider programme of cultural and community development and empowerment. The Trust, Ms Thorpe, Mr Solomon and many of the Moriori members of the Trust were all committed to achieving these goals.
- (b) Ms Thorpe's role looks like a senior management role yet does not contain a specified mandate and accountability that sits with such a role, because of the unique circumstances of how the relationship came about and the autonomy that Ms Thorpe had.
- (c) Ms Thorpe appears to be integrated into the Trust but part of this is a product of much wider integration into the cultural and community aspects of living on Rēkohu and sharing the same goals.

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<sup>5</sup> The Trust currently operates with a Chief Executive who oversees the management and operation of five business units: farming, cultural projects, nursery, office and marae maintenance and tourism.

[33] With this context in mind, I will assess the relationship by applying the steps in *Bryson*.

*Parties' intentions*

[34] Whilst there was no written agreement at the outset of Ms Thorpe's engagement, I find, given the circumstances, the basis on which the parties intended her to operate initially was as a contractor.

*Ongoing performance*

[35] I find that Ms Thorpe's ongoing work for the Trust operated on a contractor basis:

- (a) Ms Thorpe had a large amount of autonomy in deciding what work she did and how she did it. Overall, there was limited input from the Trust as to the work she undertook (see further discussion below about control).
- (b) Ms Thorpe continued to invoice for her work through Kotuku, charging differing amounts depending on the work done and her view on how much some of the work was worth. Ms Thorpe would unilaterally discount the rate or hours charged at times and unilaterally increased the rates she charged for her work.
- (c) Ms Thorpe never claimed any employee entitlements and the Trust did not provide any. So, for example, Ms Thorpe did not get any holiday pay, sick pay, additional pay for work on public holidays, or KiwiSaver contributions. Ms Thorpe did not have an employment agreement and whilst she says she asked for one, I am not persuaded this was the case nor that the Trust refused to provide one. As was put to Ms Thorpe, she could have arranged for an employment agreement given her direct contact with the Trust's employment advisors and her input into HR and administrative matters.

*Control test*

[36] Ms Thorpe says her work was tightly controlled by the Board. She says she was instructed by the Board and/or the CEO but it is unclear how comprehensive that was. Members of the Board say they did not instruct Ms Thorpe, rather she identified what cultural projects were appropriate for the Trust and then went about arranging the funding (through grant applications) and kept the Board updated with reports.

[37] My assessment of the evidence is that whilst initially there may have been some instruction to Ms Thorpe by Ms King and Mr Solomon, what developed was an autonomous role in which Ms Thorpe decided what work she would do, when she would do it and how it would be done. This was subject to constraints that certain tasks brought with them in terms of how and when certain things might be done. Ms Thorpe's work appeared to be derived from a broad understanding of what the Trust wanted or needed to achieve in terms of re-establishing it and achieving its goals going forward - Ms Thorpe's work was a product of what she saw as appropriate given what needed to be done for the Trust or, in the early years of her work, what Mr Solomon was doing.

[38] I do not accept that the Board provided direct instructions to Ms Thorpe on cultural projects, rather she identified projects, some times with input from others, and had her work approved through Board reports.

[39] Office and marae management work appears to flow from what Ms Thorpe saw as necessary or required by Trust needs and much of this work appeared to fit in around the cultural project work Ms Thorpe did. Some of it also appears to vary in terms of what category of work it was recorded as and the rate it was charged at. For example, in some months work on Board minutes fall to office management and is charged at the lower rate and other times it is recorded as project work and charged at the higher rate. It appears Ms Thorpe was able to make this decision based on her assessment of the work as there is no evidence of instruction from the Board indicating the type of minutes and rate to be charged. The same

applies throughout the invoices from Kotuku for other work such as Trust correspondence, administration, cooking and meal preparation, newsletters and staff meetings.

[40] Overall, the significant level of control exerted by Ms Thorpe over the work she did for the Trust, and what she charged for it, indicates she was a contractor.

*Integration test*

[41] Ms Thorpe was integrated into the Trust given the nature of her work and her overall involvement in community. Ms Thorpe had an office at the Trust but she used her own computer and car. Ms Thorpe referred to herself as being part of the Trust at times and other times referred to herself independently of the Trust – this is so for her email signature and references to her in some Trust publications.

[42] Overall, the level of integration of Ms Thorpe into the Trust suggests she was an employee.

*Fundamental test*

[43] I am satisfied that Ms Thorpe was in business on her own account. This is because she made her own decisions about the work she did for the Trust and others (albeit limited). Ms Thorpe was able to control the amount of money she made by choosing what work she did, how much she did and what she charged for it. Ms Thorpe also managed her earnings through Kotuku and obtained the accounting benefits of this. Finally, the limited goodwill generated from some of the cultural projects was attributable to Ms Thorpe and her consultancy – the evidence of third parties was that they would engage Ms Thorpe for consultancy work if the opportunity was to arise.

[44] The fundamental test indicates that Ms Thorpe was a contractor.

*Industry practice*

[45] There is no useful guidance obtained from industry practice in this case.

*Standing back - my broad and realistic assessment*

[46] The work Ms Thorpe undertook was mutually beneficial for her and the Trust – this is in part because the interests of the Trust and Ms Thorpe aligned, but also because Ms Thorpe gained professional, cultural and intellectual satisfaction from the work she did. The work generated some goodwill for Ms Thorpe. Ultimately Ms Thorpe had a large amount of control over the work she did to achieve goals and how much money she made (although there was some limitation on this).

[47] Ms Thorpe decided what work she did, when she did it, how she did it, how much time she spent on it and what she charged for it. She had some accountabilities, but this was generally after the work was done or during the execution of the work. Ms Thorpe’s ability to control her work meant she could also control to some extent the amount of money she made.

[48] Ms Thorpe charged as a contractor and obtained that benefit.

[49] Ms Thorpe never treated herself as an employee, not seeking or receiving any employee benefits or entitlements – she did not get annual leave and holiday pay, no sick leave and sick pay, no extra payment for work on public holidays and no KiwiSaver contributions. Ms Thorpe did not have set hours of work and the times, days and hours she worked varied on a monthly basis. Ms Thorpe did not have an employment agreement. Ms Thorpe did not have other employee benefits such as a company car or participation in a bonus and/or superannuation scheme. Ms Thorpe did not have Trust provided equipment such as a laptop and mobile phone and she was not given a uniform.

[50] The control and fundamental tests outweigh the integration aspects and indicate a contractor relationship.

[51] Overall I am satisfied that Ms Thorpe was a contractor and not an employee of the Trust.

## **Orders**

[52] Ms Thorpe was a contractor to the Trust and I do not have jurisdiction to investigate her claims.

## **Costs**

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, the Trust 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 Ms Thorpe would 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.

[54] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>6</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>6</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).