

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 121
3217659

BETWEEN	MZHZ Applicant
AND	LPS MESH LIMITED First Respondent
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Caitlin Sargison and Kirsty McDonald, counsel for First Respondent
Peter Chemis and Erika Hendy, counsel for Second Respondent

Investigation: On the papers

Submissions and other information received: 18 August, 9 September, 31 October, 4, 5 and 12 December 2023, 23 and 26 January 2024 from the Applicant
3 October 2023, 17 November 2023 and 8 February 2024 from the First Respondent
13 October 2023, 17 November 2023 and 8 February 2024 from the Second Respondent

Date of Determination: 29 February 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Interim non-publication order

[1] Paragraphs [16] and [17] of this determination contain an interim non-publication order.

[2] The applicant's name and the name of his company have also been anonymised in this preliminary determination, in order to preserve his challenge rights on his unsuccessful non-publication order application, see paragraph [15].

Application for a permanent non-publication order

[3] On 26 January 2024 the Applicant, who has been referred to in this determination as 'Mr Z', lodged an application for a non-publication order to prevent the publication of his name and identifying information and that of his company that has been referred to in this determination as 'I Limited' (I Ltd).

Grounds of application

[4] Mr Z's grounds for seeking a non-publication order were to protect his well-being, avoid potential impacts on future employment opportunities and to prevent prejudice against him. He believed the public association of his name with this matter "could significantly hinder my prospects for future employment" and open him to "bias and discrimination from potential employers."

[5] Mr Z also wanted to protect the privacy of his financial information. In addition, Mr Z referred to the discrimination he said he already faced due to his Muslim faith and the impact that has had on his mental and emotional well-being. The inference being that the discrimination he said he already faced, in addition to publicity associated with these Authority proceedings, meant the high threshold had been met to make a permanent non-publication order appropriate.

Taska's position

[6] The first respondent, LPS Mesh Limited trading as Taska360 (Taska) objected to a non-publication order being issued. It said the applicant's application had not overcome the strong public interest in, and presumption of, open justice.

[7] Taska pointed out there was an absence of evidence of the perceived impact of publication over and above what could be expected of any other applicant who challenged their employment status in Authority proceedings.

MSD's position

[8] The second respondent, the Chief Executive of the Ministry of Social Development (MSD), adopted a neutral position regarding Mr Z's non-publication order application. However, it noted the threshold for a non-publication order is high and required the applicant to "show specific adverse consequences" that justified making an exception to the fundamental principle of open justice.¹

[9] MSD referred to the leading Supreme Court decision on non-publication in *Erceg v Erceg*, which stated that non-publication must be "necessary to secure the proper administration of justice", which was to be construed broadly.² Mere embarrassment or concern about unwelcome publicity by a party seeking a non-publication order would be insufficient to meet the high standard that was required.³

[10] MSD noted that the applicant's concern about the publication of his name and/or the name of his company impacting on his future employment prospects and professional interests was a possible consequence of all Authority proceedings, so was unlikely to be sufficient in itself to justify departing from the fundamental rule of open justice.

Outcome of application for a permanent non-publication order

[11] Mr Z's application for a non-publication order did not succeed. The evidence he relied on fell short of establishing that the presumption of open justice should be overridden.

[12] The Authority was not satisfied that the high threshold to warrant the issuing of a non-publication order had been met. Nor did it consider non-publication of the applicant's name and/or the name of his company or identifying information about them, was necessary or appropriate in order to ensure the proper administration of justice.

[13] Mr Z's fear about the impact the Authority's public determination may have on future employment prospects is a matter that many employee applicants, and sometimes witnesses, have. Publicity is a known likely consequence of engaging in Authority

¹ *Erceg v Erceg* [2016] NZSC 135 at [13].

² Above n1.

³ Above n1.

proceedings. In this case that was under Mr Z's control, because he was the applicant, so he elected to challenge the status of the relationship he had with the respondents.

[14] This matter was limited to determining whether at the material time Mr Z was an employee or not. It therefore did not involve any allegations of wrongdoing or of blameworthy conduct, which are a feature of many employment related cases. The embarrassment that many unsuccessful applicants, who are found to have engaged in blameworthy conduct, potentially suffer by having their wrongdoing publicised was not a risk in this case.

[15] The applicant's name and his company's name have been anonymised in this determination, in order to preserve the status quo pending the expiry of his challenge rights. The Authority has also deliberately not recorded the applicant's hourly rate for the work he and his company did for MSD in this determination, in order to preserve the privacy of his financial information in the absence of a non-publication order.

Interim non-publication order

[16] For the sole purpose of preserving the applicant's challenge rights on the Authority's decision not to issue the non-publication order he applied for, an interim non-publication order preventing publication of the applicant's name and the name of his company has been made.

[17] This interim non-publication order remains in place for 30 days only from the date of this determination, in order to ensure that the applicant's right to challenge this decision was not rendered nugatory. If this matter is challenged, then it will be up to the Employment Court to issue a new non-publication order after that date, if it considered that was appropriate.

Employment Relationship Problem

Jurisdiction issue

[18] This is a preliminary determination about whether or not the Authority has jurisdiction to investigate Mr Z's employment based claims against one or both of the respondents.

[19] The Authority only has jurisdiction over employment relationship problems that arise between parties who are in an employment relationship, as defined by s 6 of the Employment Relations Act 2000 (the Act).

[20] This determination therefore assessed whether, at the material time, Mr Z was in an employment relationship with either Taska and/or MSD. Mr Z claimed he was, while Taska and MSD maintained he was not.

Brief summary of the material background to the jurisdiction issue

[21] Taska is a contracting recruitment business which provides professional contracting services to MSD and others.

[22] Mr Z worked for his own company, I Ltd which in turn contracted its services to Taska.

[23] Taska contracted with MSD to provide it with someone who could undertake necessary IT work for it, for an agreed (short) period of time.

[24] Taska then engaged Mr Z, via his company I Ltd, to provide IT services to MSD for a short term contract that ran from 2 May 2023 to 16 December 2023.⁴

[25] Mr Z performed the expert IT services and expertise that his company 'I Ltd' had been contracted to provide to MSD for the specified period, being 3 May 2022 to 16 December 2022.

The parties' positions

[26] Mr Z subsequently claimed he was employed by either Taska and/or MSD, because he wanted to bring employment related claims against them.

[27] Taska and MSD both denied that the parties were ever in an employment relationship. They also said that neither of them had a direct contractual relationship with Mr Z, because he had provided his services via his limited liability company - I Ltd.

⁴ Mr Z actually started work for MSD on 3 May not 2 May 2022.

The Authority's investigation

[28] By agreement with the parties, the Authority has investigated this preliminary issue (being the disputed status/nature of the parties' relationship) 'on the papers'.

[29] Given the amount of documents the parties relied on, the parties lodged a 339 page agreed joint bundle of relevant documents (the JB) instead of attaching them as exhibits to their affidavits. After the JB had been lodged Mr Z and MSD also each submitted additional documents, that were attached to affidavits.

[30] Mr Z lodged four affidavits from himself (18 August 2023; 9 September 2023; 30 October 2023 and 4 December 2023). Mr Z also lodged an affidavit from Mr Lester Slee on 9 September 2023.

[31] Mr Slee is an IT Consultant who has worked for IBM New Zealand since 2002. He met Mr Z in July 2022 when he (Mr Slee) was part of an IBM team that MSD contracted to help with the backlog of work. Mr Slee's engagement with MSD lasted until mid-December 2022.

[32] On behalf of Taska, Mr Nathan Masters lodged an affidavit sworn on 3 October 2023. Mr Masters is the General Manager of Taska, which is a large recruitment business focused in the technology and digital vertical.

[33] Mr Rupert Applin is MSD's Head of Technology – Principal Adviser. From 12 September 2022 to 21 September 2023 he acted as Head of Technology – People and Capability within MSD's Improvement, System and Technology (IST) Group.

[34] Mr Applin lodged two affidavits (13 October 2023 and 17 November 2023). Mr Applin's second affidavit attached copies of documents he had referred to in his first affidavit, but which were not in the JB. He also provided further information about which of the various documents he had identified to the Authority had or had not been provided to Mr Z.

[35] Mr Tran Gilmour also provided an affidavit in support of MSD to the Authority on 13 October 2023. Mr Gilmour is a Technical Product Manager, Emerging Technologies, for MSD, a role he has held since 10 October 2022. Before that he was employed by MSD as the Product Manager, Workflow and Integration, a role he held for approximately 12 months.

[36] The parties each lodged written submissions after all of the affidavit evidence had been provided to the Authority. Mr Z also lodged reply submissions. Mr Z then subsequently made an application for a permanent non-publication order on 26 January 2024, which the respondents replied to on 8 February 2024.

Issues to be determined

[37] The following issues are to be determined:

- (a) Analysis of all relevant matters regarding the status of the parties' relationship;
- (b) Was Mr Z in an employment relationship with Taska and/or MSD?
- (c) Does the Authority have jurisdiction over Mr Z's claims?
- (d) What if any costs should the successful party be awarded?

Material Background

[38] Taska mostly works with public sector organisations and government departments to source contracted talent for their businesses.

[39] After a competitive process, Taska was included in the All-of-Government Recruitment Panel (AGRP), which is governed by the All-of-Government Contract Services Agreement (AoG).

[40] The AoG provides for a panel of recruitment agencies that MSD can use to assist it in finding both employees and contractors for various projects. Under the AoG, Taska is part of a panel of suppliers that the public sector engages with when seeking contractors for project work.

[41] The recruitment agencies have a Service Agreement with the Ministry of Business, Innovation and Employment (MBIE) as a provider under the Agreement, and MSD then joins as a participating agency through a Letter of Accession and Memorandum of Understanding. This then permits MSD to engage a recruitment agency to assist with external recruitment services under the AoG process and rates.

[42] On selection of a candidate, a Recruitment Services Order (RSO) is entered into between the recruitment agency and MSD, confirming the particulars of the Agreement. MSD does not have a contractual relationship with the individual candidate.

[43] The RSO between Taska and MSD was the only contract or agreement entered into by MSD as part of Mr Z's provision of expert IT services within the IST Group.

[44] Taska engages with MSD through the AoG. Taska's relationship with MSD is provided for in a Services Agreement, under which MSD contracts Taska to find, source, and identify contract workers.

[45] MSD is the largest public service department in New Zealand – and, as at 15 September 2023, it employed or engaged approximately 10,700 individuals in over 200 locations around New Zealand. MSD's IST Group is responsible for providing, improving, and managing MSD's technology systems and infrastructure.

[46] On a day-to-day basis the IST Group is responsible for providing high quality, reliable, secure IT services to MSD and its clients, and supporting MSD in achieving its business goals and objectives through systems improvement practices and scaling through IT. The IST Group is also responsible for managing MSD's IT resources efficiently and effectively.

[47] The IST Group utilises external resource when specialist skills or expertise for a particular service or programme is not available from within the existing workforce. While the IST Group prefers to fill positions with permanent staff, this is not always possible, in which case they use external resources such as contractors.

[48] This occurs for a fixed duration or piece of work where MSD does not expect to need an enduring resource and where, if the appropriate resource is not found then, the essential work delivery would be delayed, meaning that MSD cannot deliver prioritised or legislative work.

[49] When the IST Group identifies that an external resource might be required, the first step is that the request is approved by the Group General Manager – IST. The request is then put to the IST Resource Panel, which operates as a central forum to govern the sourcing process and external IT services.

[50] If the IST Resource Panel agrees that the resource is required, then it is endorsed by the Deputy Chief Executive for People and Capability. Following that endorsement, the request for a contract resource must be passed to a minimum of three AoG endorsed recruitment agencies.

[51] The specialist nature of the work undertaken by the IST Group meant that the skills and resources it required were not always available within its existing workforce. Those gaps were then often filled by an external resource, which necessitated MSD to engage contractors or utilise vendor supplied staff.

[52] Prior to entering into a contracting agreement, such as the contracting arrangements in issue in this matter, the IST Group advertised internally and externally and through external recruitment agencies but found no suitable candidates with the required skillset that it could engage as employees. That situation necessitated MSD's need for an external resource to fill the gap as a matter of urgency.

[53] On 14 February 2022, the IST Group got approval to get external resource for three short term contractor assignments. When the IST Group identified that an external resource may be required, that request went through a number of internal approval processes. MSD then used the AOG external recruitment services to source the required external resource.

[54] On 18 February 2022, MSD approached Taska seeking external recruitment services to find individuals for short term assignments within the IST Group to deliver the external resource required, namely being two IIB developers and one API developer. These individuals were paid significantly enhanced contractor rates, instead of the normal hourly rate that an employee would have received.

[55] The RSO in Mr Z's case had specified the duration of the contract, the estimated cost of the contract, and specifications of the required skills to be provided by candidates proposed by the recruitment agencies that were contacted.

[56] MSD uses external resources such as contractors or vendor supplied staff, for a number of reasons, and at any given time there are a number of external resources providing their expert services to the IST Group. These include both vendor supplied staff and independent contractors.

[57] As at late June 2023, the IST Group had around 520 permanent staff, 130 independent contractors, and 370 vendor supplied staff who were engaged by third party vendors (for example, Spark, Fujitsu, or Taska) to provide a specific technical service to MSD.

[58] These numbers fluctuate as per MSD's needs. For example, as at 7 November 2022, the IST Group had 463 permanent staff, 142 (or about 15 percent) who were independent contractors, and 309 vendor supplied staff

[59] Mr Z responded to an advertisement from Taska seeking Senior Integration Developers for contract work. He was selected as a suitable resource to fulfil MSD's requirements as per the contract MSD had with Taska to find it experienced IT resources. Accordingly, Mr Z's company, I Ltd, entered into a Consultancy Agreement with Taska.

[60] Mr Gilmour explained how he was on the interview panel for Mr Z, who was identified as a suitable external resource because he had previous IBM App Connect, IBM API Connect, and IBM CloudPak for integration experience. That helped supplement knowledge within the existing IST Group, because no-one else had such experience or knowledge, and MSD's attempts to recruit an employee for the role had been unsuccessful.

[61] Given the nature of the IST work, individuals within the IST Group need to work together to deliver the various project deliverables. Therefore, many different employees, contractors, and external resources are working together simultaneously. They cannot operate in isolation and there needs to be a sharing of information and a collaborative approach in order to achieve the required result.

[62] The 'scrum leaders' within the IST Group are responsible for leading the team members through the various sprints of a project and for ensuring deliverables are being met. They assign 'work packages' to those involved in doing the required work (such as Mr Z). These 'work packages' specified what needed to be delivered, recorded, and addressed any impediments. They also ensured the integration of activity into the broader delivery system through relevant protocols.

[63] Mr Z commenced providing IT services to MSD on 3 May 2022 and concluded on 16 December 2022. This start date was slightly later than the timeframe specified in the advertised engagement which MSD had contracted with Taska to provide, presumably because Mr Z had to give notice to his previous employer.

[64] During the period that Mr Z provided IT services and expertise MSD paid Taska as per the RSO. Invoices were submitted by Taska for the time that Mr Z had worked,

based on time he had recorded within Taska's online systems. This information was verified against MSD's internal time recording tool, before Taska's invoices were paid by MSD.

Relevant law

[65] In order for the Authority to have jurisdiction to investigate Mr Z's various employment related claims, he must establish on the balance of probabilities that he was an employee who was in an employment relationship, as defined by s 6 of the Act, with one or both respondents.

[66] Section 5 of the Act interprets an employment relationship as any of the employment relationships specified in s 4(2) of the Act.

[67] Section 4(2) of the Act defines an employment relationship as (among other things) the relationship between an employer and an employee employed by the employer. Section 4(2) of the Act does not include parties who are in an independent contractor relationship.

[68] Section 6 of the Act defines the meaning of "employee". It includes any person employed by an employer to do work for hire or reward under a Contract for Service.

[69] Section 6(2) of the Act requires the Authority when determining whether or not a person is an employee to determine "the real nature of the relationship" between the parties. When doing so, s 6(3) of the Act requires the Authority to consider "all relevant matters," including the intention of the persons involved. However, the Authority must not treat as determinative any statement by the parties which described the nature of their relationship.

[70] The labelling of a relationship by the parties is therefore merely one of the factors to be considered within the overall factual matrix. So the intention of the parties is relevant to, but not decisive of, the question of whether or not Mr Z was employed by Taska and/or MSD.

[71] The Employment Court has provided a body of case law that has recognised that what is described as the common law tests of control, integration, and the fundamental/economic reality test, can also provide assistance to the Authority when it is determining the real nature of the relationship between parties. While no one test is

determinative, each of them involve relevant factors for the Authority to consider, along with all other relevant evidence.

[72] Accordingly, the Authority's enquiry into the real nature of Mr Z's relationship with Taska and with MSD is intensely factual. An employment relationship may also be inferred from the conduct of the parties, despite the parties not having put that label on it themselves.

[73] When determining the real nature of the relationship between these parties, the Authority must not take a rigid or strictly contractual approach to the normal contract formation elements of offer, acceptance, certainty of terms, intention to create legal relations, and consideration because it is not to be focused on form over substance.⁵

[74] Section 6 of the Act requires the Authority to consider the reality of the working relationship in order to determine its contractual status.⁶ The application of s 6 of the Act was considered by the *Supreme Court in Bryson v Three Foot Six Limited (No. 2)*.⁷ The Supreme Court identified that the reference to "all relevant matters" in s 6(3)(a) of the Act included:

- (a) The terms of the agreement between the parties, including all written and oral terms regarding the parties' intentions regarding the status of their relationship;
- (b) Consideration of how the relationship operated in practice and whether there were any divergences from, or supplementation to, the terms and conditions the parties had agreed on at the outset of the relationship;
- (c) Any features of control and integration; and
- (d) Consideration of any indications regarding whether the contracted person had been working on their own account (sometimes described as "the fundamental test").

⁵ *Prasad v LSG Sky Chefs New Zealand Limited and Anor* [2017] NZEmpC 150.

⁶ Above n5 at [34].

⁷ [2005] ERNZ 372 at [32].

[75] The full Employment Court in *Prasad* recognised that labour hire arrangements offered distinct advantages in terms of managing the ebb and flow of a business' operational demands.⁸ It stated:⁹

It is less likely that a host organisation will be found to be in an employment relationship with a labour hire worker where, for example, the arrangement and the obligations, rights, and roles of each party is well documented, understood and agreed at the outset, and the work is provided on a supplementary and temporary basis.

[...]

A labour hire agreement does not represent an impenetrable shield to a claim that a 'host' is engaging the worker under a contract of service. Much will depend on the particular facts of the individual case and an analysis of the real nature of the relationship, including how it operated in practice.

Analysis of all relevant matters regarding the status of the parties' relationship

Written terms of the Consultancy Agreement

[76] There was no direct contractual relationship between Taska and Mr Z or MSD and Mr Z. Taska entered into a contract for services with Mr Z's company, I Ltd. As a limited liability company, I Ltd cannot be classified as an employee in terms of the s 6 definition in the Act.

[77] However, even though I Ltd contractually 'stood between' Mr Z and Taska and MSD, that would not prevent the Authority from finding that an employment relationship still existed – if the particular facts of this matter supported that conclusion.

[78] Taska and I Ltd entered into a "Consultancy Agreement" (the Agreement), which recorded that those two entities were the parties to the Agreement.

[79] Clause 4 of the Consultancy Agreement dealt with the "Status of Contract". It recorded that the purpose of the agreement was to set out the basis on which I Ltd accepted professional contracting arrangements with Taska's clients. It recorded:

4.2 This agreement is a contract for service. Nothing in it or any future conduct shall be taken as creating an employment relationship.

4.3 You are responsible for the payment of all tax, GST, Accident Compensation levy, and any other relevant payments. [...]

⁸ Above n5 at [39].

⁹ Above n5, at [92] and [98].

[80] That clearly recorded that the stated mutual intention of Taska and Mr Z at the outset of their relationship was that it would not be an employment relationship. That mutual stated intention did not change during the relationship. Nor did Mr Z advise either respondent he wanted to change his mutually agreed status as a contractor, while the contractual relationship was still in place.

[81] Mr Z did not raise any issues about his status until many months after he had stopped providing his services to MSD. Although Taska offered to assist him to find new engagements after the contract with MSD had ended (as per the agreed end date), Mr Z declined that offer.

[82] Clause 6 of the Consultancy Agreement dealt with “payment”. It required I Ltd to submit a timesheet each week, which was to be authorised by Taska’s client, which in this case was MSD. I Ltd was also required to provide an invoice and to comply with GST requirements, although that did not ever occur. In practice I Ltd submitted timesheets only, but no invoices.

[83] I Ltd was to be paid based on approved timesheets, with Taska being responsible for invoicing and accounting between it and its client, MSD, for the work I Ltd carried out. Taska therefore did the invoicing of MSD for the work Mr Z, via I Ltd, did. I Ltd was paid by Taska for the hours of work Mr Z performed for MSD.

[84] Clause 7 of the Consultancy Agreement dealt with “Termination”. It required I Ltd to complete the full term of the assignment with MSD, although it did have the ability to terminate the assignment prior to the end date, by providing 10 working days’ notice. Neither party terminated the contract by notice. Nor did the MSD work end early, so the engagement ran for the full period that I Ltd and Mr Z had agreed to.

[85] Further provisions were included in clause 7 which related to Taska’s ability to terminate what was described in clause 7.1.3 as “the employment agreement”. The Authority considered that reference to “employment agreement” was likely a typing error, because that terminology was not reflected elsewhere in the document. Clause 4.2 also expressly stated there was no employment relationship.

[86] Clause 15 referred to “A Contractor Company” and provided that an incorporated company (such as I Ltd) could be party to the agreement. However, in which case the company director (such as Mr Z) had to guarantee the performance of

all services and obligations under the agreement and they were also responsible for any losses suffered as a result of a breach of it.

[87] Clause 16 dealt with “Exclusivity” and recorded that I Ltd was not bound to provide services only on Taska’s behalf.

[88] Clause 17 dealt with “Arbitration”. This clause provided that a mediation would be appointed to resolve any disputes. If that was unsuccessful then the dispute between the parties would be referred to an arbitrator in accordance with the Arbitration Act 1996.

[89] Clause 18.2 was a “Contractor Acknowledgment” clause. It acknowledged that the contractor had the opportunity to seek advice on the agreement and “understood the significance of the status of contractor.” This clause reinforced the contractor status.

[90] Clause 19 was a “Guarantee Option” which applied where the contractor was a company. It provided that the guarantor (in this case Mr Z) accepted they would be responsible for the performance of the contractor (in this case I Ltd) under the agreement and for the obligations and liabilities under the Consultancy Agreement.

[91] Clause 20 was referred to as “Annexure I” which dealt with the Inland Revenue Department (IRD) obligations of the contractor.

[92] Clause 21 was “Schedule 1” which recorded the consultant company as I Ltd, the client as MSD, the consultancy services as Senior Integration Developer, the commencement date as 02.05.2022 and the end date as 16.12.2022. Mr Z started work on 3 May, not 2 May 2022.

[93] Mr Z was identified as “the Principal Person” in Schedule 1. The “normal consultancy hours” were recorded as 40 hours per week, with any hours in excess of that having to be approved by MSD.

[94] Under the “Consultancy Fee” section of Schedule 1, Taska was to pay the consultant \$[redacted], a specified three figure amount which has been redacted to preserve Mr Z’s financial privacy an hour, plus GST if the consultant was GST registered, with payment to be on the 25th of each month for the work completed in the previous month.

[95] Schedule 1 also contained a restraint clause, which Mr Z had renegotiated from 12 months to six months.

[96] In the “Extra Conditions” section of Schedule 1, Taska was to cover public liability and professional indemnity costs for the duration of the engagement.

[97] The Consultancy Agreement was signed by the parties on 27 March 2022. Mr Z said that he did not register I Ltd until the following day, 28 March 2022.

[98] The Consultancy Agreement was consistent with a contracting engagement, not with an employment relationship.

The written terms of the RSO

[99] MSD was confined in terms of what resources it could engage by the RSO, which it had to comply with. MSD’s contract was with Taska, not with Mr Z, although Taska and MSD did enter into an RSO for a contractor assignment involving Mr Z and his company. The RSO was subject to, and formed part of, the Services Agreement dated 2017 between MBIE and the provider of external recruitment services.

[100] The RSO and the terms of the MBIE and Provider Agreement applied to the provision of services by the provider (Taska) to the participating agency (MSD).

[101] The RSO records the duration of the contract as being from 26 April 2022 to 16 December 2022, a total of 166 available working days. The estimated cost of the contractor was based on an hourly rate. As it turned out, the start date was pushed back until 2 May 2022 (but then ended up being 3 May). The actual duration of the engagement was for less days than the ROS had authorised, due to Mr Z’s availability.

[102] Although Mr Z raised concerns with the respondents about some interactions he had with those he was working with (which are not relevant to the disputed relationship status issue), he worked within, and did not challenge, the contractual arrangements that had been put in place by the parties from the outset of the arrangement.

Assessment of contracting documents

[103] Mr Z was a highly skilled individual who had a unique skillset that was scarce, and therefore in high demand within New Zealand. From that perspective, he had a strong bargaining position. He was paid at the very top of the range MSD was authorised to pay an external contractor.

[104] Mr Z's company, I Ltd, was paid a three-figure hourly rate for the consultancy services it provided (meaning the services that were undertaken by Mr Z personally, for MSD's benefit). The hourly rate paid was approximately 230 percent more than the mid-point of what an employee would have received for working at MSD as a Senior Integration Developer, where even the very top of the salary band for an employee is far less than \$100 per hour.

[105] It is clear that as a highly skilled individual, Mr Z was able to negotiate for his company, I Ltd, to be paid at the highest end of the indicative pay scale for the services he provided. That demonstrated his strong bargaining power, as did the changes to the standard clauses he negotiated to the Consultancy Agreement that I Ltd entered into with Taska.

[106] The Authority considered that the mutual intent of the parties was evidenced by the structure of the contractual arrangements and resulting documentation, which made it clear that the parties did not intend to enter into an employment relationship. The Authority also noted that there was also a very significant financial benefit for Mr Z by not doing so. The contract documents recognised Mr Z's seniority and value in the marketplace.

[107] Mr Z had an opportunity to, and did, seek and obtain legal advice on the content of the Consultancy Agreement. Clause 18 also acknowledged that. Although Mr Z said he only sought advice on specific aspects of the Consultancy Agreement, that was his choice. He therefore entered into the contracting arrangement the parties mutually agreed to, having had the benefit of legal advice.

[108] In the lead up to Taska and I Ltd entering into the Consultancy Agreement, Taska and Mr Z had both referred to the intended arrangement as "a contract for services." There were no discussions about employee entitlements or benefits such as KiwiSaver or leave, which would have been expected had there been a mutual intention to create an employment relationship.

[109] The conduct of the parties prior to signing the Consultancy Agreement, and the content of the Consultancy Agreement, established that Taska and Mr Z did turn their mind to the status of their relationship and intended for that to be an independent contracting arrangement, as opposed to an employment relationship.

[110] MSD did not provide any advice or instruction to Taska or to Mr Z about their Consultancy Agreement arrangements. In particular, MSD had no discussions with Mr Z about incorporation and was not involved in his decision to incorporate a company or his decision to enter into a Consultancy Agreement.

Industry practice

[111] The Authority takes judicial notice of the fact that it is not uncommon within the IT sector for individuals to make themselves available as contractors.

[112] MSD engages about 15 percent of its workforce as independent contractors. Because of the demand for specialised IT services, MSD's evidence was that some IST roles could only be filled by an external resource. That was the case here.

[113] If Mr Z had asked to be an employee then that may have been able to have been accommodated given his valuable expertise and skillset. However, he would have been paid under the significantly less salary band that applied to employees. Mr Z never made that request, which suggested that he did not want to be an employee at the time of the engagement.

[114] Industry practice is not conclusive of the status issue as an individual in this industry could be either an independent contractor or an employee, depending on the particular circumstances of the arrangement. The Authority has therefore merely noted that these parties' arrangements occurred in an environment where contracting was not uncommon and Mr Z never asked to be an employee or for an employment relationship.

Operation of the relationship in practice

[115] At no time prior to the arrangements being entered into between Taska and I Ltd, or before Mr Z started providing services to MSD, did he query or indicate that he was unhappy with the terms and conditions of the Consultancy Agreement.

[116] Nor did Mr Z suggest that the terms the parties entered into did not represent the parties' true intention or the real intended nature of the relationship that was to be created. Mr Z also did not seek to have a different status or a direct employment relationship with MSD during the period he worked for it.

[117] These issues regarding the status of the parties' relationship did not arise until 14 March 2023, which was approximately three months after his contract for services

with Taska had ended, in accordance with the end date of 16 December 2022 recorded in the Consultancy Agreement.

[118] It was Mr Z who elected to incorporate a company (I Ltd) to contract with Taska. He had the opportunity to take legal advice before doing so. MSD was not involved in that arrangement. Specifically, it was not involved in Mr Z's decision to incorporate a company or its decision to enter into a Consultancy Agreement via his company, with Taska.

[119] The relationship between I Ltd and Taska was one in which I Ltd provided Taska with time records, which Taska then used to invoice MSD. MSD would check the time invoiced against the time records it had, then would pay Taska's invoice. This arrangement is consistent with standard practice within the labour hire industry.

[120] Although Mr Z identified some variances between what the Consultancy Agreement provided and what actually occurred, the Authority did not consider these were material. The working relationship between Taska and I Ltd was materially consistent with the terms of the Consultancy Agreement, and as such was consistent with the existence of a contractor arrangement.

[121] MSD acted consistently with the RSO it had with Taska, in that Mr Z provided specialised IT services as a Senior Integration Developer for the specified length of the assignment, for the number of hours that MSD had identified it required services to be provided, at the high hourly rate it had agreed would be paid.

[122] Although Mr Z made much of the fact that he believed he was required to provide specialist expertise outside of his role as a Senior Integration Developer, he did not take any issue with that at the time.

[123] Because he was being paid per hour for the services he provided, had he not undertaken all of the work that had been provided to him (for example, if he believed some of the work offered was outside what he had agreed in the Consultancy Agreement to do, being lower level work than his expert skillset) then he could have refused that work.

[124] However, that could have had an associated impact on the number hours of services I Ltd was required to provide (up to a maximum of 40 hours per week), and therefore on Mr Z's earnings for that period.

[125] Had Mr Z believed at the time that he was being required to do work outside of the Consultancy Agreement, then he could have given 10 working days' notice to end the agreement, but he did not do so. He also could have raised a concern about that with Taska, but did not do so.

[126] The Authority concluded that Mr Z was happy to provide the services that MSD asked him to provide, which were within his skillset, experience, and capabilities, and which were consistent with the nature of the IT services that his company, I Ltd, had been contracted to provide.

Taxation arrangements

[127] MSD did not pay any tax for I Ltd and/or Mr Z. Taska charged MSD GST on its invoices, which was the only tax that MSD paid for the work Mr Z did for it.

[128] Taska was responsible for invoicing MSD, and it was responsible for paying I Ltd for the work that Mr Z had done for MSD. The Consultancy Agreement set out the payment arrangements, but these were not adhered to.

[129] Taska deducted a percentage from the schedule of payments made to I Ltd, which it paid onto IRD as PAYE. Mr Z correctly pointed out that PAYE is usually an indicator of an employment relationship. However, the coding of tax payments in itself cannot create an employment relationship, so the PAYE deduction was not decisive of the status issue.

[130] Taska submitted that it did not derogate from the fundamental reality of the contractual relationship between Taska and Mr Z because Taska was legally required to make these payments in order to comply with the Income Tax Act by making scheduler payments to contractors.¹⁰ Aside from the administration of payments to I Ltd, Taska was not involved in I Ltd's business operations.

[131] Mr Z presented evidence to the Authority that proved he did not personally gain tax advantages by structuring the Consultancy Agreement so that his company, I Ltd, was a party to it and not him personally. However, he did not seem to have realised that until later, when his accountant drew it to his attention.

¹⁰ Income Tax Act 2007, Schedule 4, Part J.

Offer of work

[132] The offer of work was for a contracting relationship. The high level of payment compared to what an employee would have been offered (being at least 230% more) reflected that, so it must have been understood by Mr Z that that was what was on offer, not an employment relationship.

Employment documentation

[133] There was no employment documentation, such as the legally required wage and time records or holiday and leave records, an employer is required to keep for each employee. The absence of any employment documentation tended to indicate that the parties were not in an employment relationship.

Was Mr Z in business on his own account?

[134] Mr Z can be said to be in business on his own account via his company I Ltd. I Ltd charged a hefty premium for Mr Z's expertise and skills that was over and above what he could expect to have received as an employee who was paid an hourly wage.

[135] There was therefore a significant financial benefit to Mr Z by engaging in the MSD work as an independent contractor, instead of as an employee. Operating his own business in this way allowed Mr Z to profit in a way he would not otherwise have been able to, had he been engaged by one of the respondents as a waged or salaried employee.

Tools of trade

[136] Taska did not provide I Ltd and/or Mr Z with any tools or equipment that he needed to carry out the work for MSD.

[137] MSD provided Mr Z with the physical equipment he needed to do the work he had been engaged to do. This included MSD providing Mr Z with access to all of the necessary software, tools and licences. MSD also provided Mr Z with a laptop and associated accessories such as a mouse, keyboard, headset and docking station.

[138] Given the nature of the services the IST group provided, including those expert services provided by Mr Z, it was understandably not appropriate for contractors to provide their own tools, such as laptops, when providing their services to MSD.

[139] That was necessary because MSD digital systems contained data about its clients which had to be kept secure. The best way to ensure that happened was for MSD

to provide laptops, etcetera, to external resources like I Ltd and Mr Z. By doing that, MSD ensured that the devices used on its systems met its security requirements. It also limited the risk of client data being accidentally released, stolen, or otherwise misused.

[140] Mr Z was provided with an MSD email address because he needed to have a secure method to access MSD systems and to allocate key software licences and system access permissions. He was also provided with an ID card so he could be identified as someone who had been authorised to access MSD property and systems.

[141] While these factors would normally be indicative of an employment relationship, in this particular case, the Authority was not satisfied that was the case.

[142] This was a unique contracting environment involving sensitive IT services which had to be kept secure. Accordingly, the steps that MSD took to achieve that (by providing Mr Z with the tools he needed) were therefore necessary, prudent, and appropriate. This was therefore viewed as neutral in terms of indicating what the status of the parties' relationship was.

Reporting of H&S event

[143] On 28 November 2022, Mr Z raised a STAR event. STAR is an internal MSD system which can be utilised by employees or contractors to report health and safety events. His use of it was therefore not indicative one way or another regarding the status of the relationship.

[144] MSD offers support to contractors who have raised concerns such as those that Mr Z had. MSD said this was a health and safety responsibility which is necessary because contractors and employees need to be able to work together. Mr Z was therefore offered support regarding the issues he had raised by way of access to the MSD employee assistance programme.

Ability to subcontract

[145] Under clause 4 of the Consultancy Agreement, Mr Z was the "Principal Person" named in Schedule 1, who I Ltd contracted would perform the consultancy services on its behalf. He could have changed the Principal Person or added to it, but did not do so.

Ability to work for others

[146] Clause 16 of the Consultancy Agreement provided that Mr Z was not bound to provide services only for Taska, or on its behalf.

[147] However, Mr Z was not permitted to engage in external work that potentially conflicted with MSD's interests. He therefore had to obtain written approval from an MSD manager prior to taking on work outside of the MSD contract, and he had to ensure that he was available to undertake the work during MSD's normal working hours that I Ltd had contracted to provide. Working for others did not arise, so Mr Z never sought that authorisation.

Request to vary contracted hours

[148] Mr Z did not believe that he was being fully utilised, so he asked to reduce his contracted hours of work. However, his request was declined.

[149] MSD had a need for 40 hours per week in IT services to be provided to it, so it informed Mr Z that he needed to be available to perform work for MSD for 40 hours per week within the specified hours (which were normal business hours). This is what I Ltd had agreed to do when it entered into the Consultancy Agreement with Taska.

[150] The requirement to perform 40 hours work per week should not have been a surprise to Mr Z, because that was the level of services that he as a "Principal Person" had agreed to provide under the Consultancy Agreement. He could potentially have added another person as the Principal Person or attempted to substitute himself for some other named "Principal Person" to actually do the work, but Mr Z did not attempt to do so.

Ability to work for others

[151] Mr Z did not receive income from elsewhere and did not engage in other work activities for the duration that he provided services as a "Principal Person" to MSD under the Consultancy Agreement I Ltd had with Taska.

[152] The issue of Mr Z working for others never arose. While he could have potentially worked for others outside of the hours that he had been contracted to work for MSD, that situation never arose. He worked full time for 40 hours per week for MSD.

Control test

[153] The control test looks at the degree of control that is exercised over the work and the manner in which it is to be done. The greater extent to which an individual is regulated and supervised, then the more likely they are to be considered an employee.

[154] MSD exercised a relatively high level of control over Mr Z in terms of requiring him to be available to do work for it during the allocated hours of work (normal business hours), for 40 hours per week to be undertaken from Monday to Friday, excluding public holidays.

[155] Whilst Mr Z had the freedom to choose his location of work and how he did the work, the nature of the services that he provided via I Ltd (as the Principal Person who was providing the services) he was required to work within the organisational boundaries that the IST Group and MSD operated within.

[156] It was therefore not practicable in these particular circumstances in this unique and sensitive work environment for I Ltd and/or Mr Z to be able to work in isolation or completely autonomously because of the specialised nature of the work Mr Z was undertaking.

[157] It was important that the services that Mr Z was providing as a Senior Integration Developer were delivered within MSD's work process boundaries, architectural patterns, and standards to ensure interoperability across system components. MSD therefore exercised some control over Mr Z, via the 'scrum leaders' who were responsible for ensuring the required work was delivered by all those working in the IST Group, regardless of their status.

[158] Integrity of MSD's IT systems is also a relevant factor in terms of how it organised and managed those working within its IST Group, whether they were employees or external contractors. This level of control was a practical reality of having external people working within the highly sensitive IST environment.

[159] The Authority was satisfied in this case that the control that was exercised by MSD over how and when Mr Z provided the services as the Principal Person who had been contracted to provide specific services for a short period was a necessary component of that particular working environment. Therefore it was not a reliable indicator as to the status of the relationship between the parties.

[160] The nature of control that occurred in this case was inevitable for the operations that MSD was running, and the sensitive and specialised nature of the services that I Ltd and Mr Z were providing.

[161] This is a situation in which the degree of control that occurred in practice was necessary and beneficial to all parties, including Mr Z, as it enabled him to ensure that he met the outputs that were required within the necessary time frames and that the work would integrate with the IT system in the way it was required to do so.

[162] Taska did not exercise any day-to-day control over Mr Z, who recognised that in his affidavit evidence. Taska did not have any oversight regarding the level of control MSD exercised over Mr Z.

The integration test

[163] The integration test considers whether the work performed by Mr Z was an integral part of Taska's and/or MSD's business to the extent that he had effectively become part and parcel of either Taska and/or MSD's organisation.

[164] As already noted by the Authority, the services that Mr Z provided could not be undertaken in isolation from the IST Group, which necessitated him having some level of integration within the IST Group. This included Mr Z attending team meetings and working closely with other IST Group members, including employees and other contractors.

[165] The practical arrangements (such as the provision of necessary software and a laptop by MSD) were put in place to enable Mr Z to provide the necessary services. This included the need for him to interact and communicate with others in the IST Group, which was necessary in order for him to provide services that were required. As already stated, the Authority considered there were good reasons as to why Mr Z could not use his own computer.

[166] The Authority considered it likely that the short duration of Mr Z's contracting engagement, along with his decision to mostly work from home, indicated that he was not part and parcel of MSD's organisation.

[167] Mr Z was not integrated into Taska's business, and it did not provide him with any equipment or otherwise integrate him into its business in any way.

Code of Conduct

[168] Mr Z was given MSD's Code of Conduct (the Code) which addressed the standards of behaviour required in the Public Sector. The Code made it clear that it applied to employees, contractors, consultants, and volunteers who worked at MSD. It was therefore neutral in terms of indicating the status of the relationship between Mr Z and MSD.

[169] The fact that Mr Z was given a Code of Conduct, and the requirement he sign a certificate of confidentiality were practical and necessary steps given the environment he was working in. That did not indicate or favour the existence of any particular type of relationship. The Code of Conduct addressed standards of behaviour required in the public sector, and it was stated to apply to employees, contractor, consultants and volunteers.

The fundamental/economic reality test

[170] The fundamental/economic reality test looks at whether a person performing services is in business on their own account. The Authority was satisfied that Mr Z was in business on his own account. He had the ability to profit from his own endeavours in a way that would not have been available to him had he been an employee.

[171] Mr Z charged high contracting rates via I Ltd, that recognised his expertise and skills that he would not have been paid if he was an employee. This allowed him to profit, effectively as his own business owner, in a way that an employment relationship would not have allowed.

[172] Mr Z also took risks in terms of if he did not perform the contracted services, then he would not be paid at that level had he been an employee. The fundamental/economic reality test suggested the existence of an employment relationship.

[173] The Authority considered that the existence of the Consultancy Agreement, while not decisive in itself, was a factor that supported the existence of Mr Z running the business on his own account.

[174] Mr Z negotiated with Taska to provide his services via his company I Ltd. On legal advice, Mr Z decided to incorporate I Ltd and that was the entity that was a party

to the Consultancy Agreement, which was an arm's length contract entered into with Taska.

[175] Mr Z via his company negotiated and agreed on a significant fee (which was the highest rate payable by MSD for the services it needed) which included GST to be paid in addition to the offered hourly rate. That indicated a business relationship.

Was Mr Z in an employment relationship with Taska and/or MSD?

[176] Standing back and reflecting on all of the evidence and submissions provided by the parties, the Authority has concluded that the real nature of the relationship between the parties was more likely than not an independent contractor arrangement, and not an employment relationship.

[177] The contractual arrangements were clear, transparent and unremarkable. Such arrangements are common and well-regulated within the public sector, particularly in relation to the provision of specialised or scarce IT services.

[178] The contracting arrangements were borne of operational necessity and occurred because MSD had not been able to secure suitable candidates for an employment relationship, despite having advertised both internally and externally, and after working through external recruitment agencies.

[179] Mr Z decided to set up a company, and he had the benefit of legal advice when doing so. He had the bargaining power to re-negotiate at least two of the clauses in the Consultancy Agreement that Taska had proposed. He was also paid the top rate that MSD had said it could pay for the services that Mr Z provided.

[180] Taska contracted on standard and transparent terms with MSD to provide Mr Z as a resource to meet MSD's specialist needs due to a skills shortage it was experiencing within its IST group. All parties were aware that the engagement was for a limited duration. Although the contract started later than MSD had originally wanted (3 May instead of 26 April 2022) it did end on the specified end date that was recorded in the RSO.

[181] Taska entered into a contract of services with Mr Z, via his company I Ltd. Mr Z is an informed, intelligent expert and experienced person who has considerable expertise in IT, to the extent that he can command a substantial fee for his services.

[182] Mr Z was fully aware of and had a clear understanding of what he was doing, and he participated fully and freely in putting the arrangements in place, including incorporating his own company. He was not an unsophisticated, desperate, or an unwilling party, and was under no compulsion to enter into these arrangements as he already had fulltime employment with another employer when he accepted Taska's/MSD's offer.

[183] Had Mr Z wanted to be engaged as an employee, then he could have proposed that as an option, but he would have been paid considerably less than he was paid under the terms of Consultancy Agreement.

[184] There was not an inequality of bargaining power here as evidenced by the substantial income he commanded, which at his request was at the very top of the suggested range and which was 230 percent in excess of what an employee (at the mid-point of the employee wage rate) with similar skills, undertaking similar tasks, would have been paid by MSD.

[185] Mr Z did not challenge these arrangements or his status while he was undertaking work for MSD. The first time he raised this issue was when he filed a Statement of Problem with the Authority on 14 March 2023, three months after his Consultancy Agreement with Taska had ended and approximately three months after he had stopped providing services to MSD.

[186] Mr Z knew when he entered into the Consultancy Agreement with Taska (via his company I Ltd) that Taska would make him available to MSD via a separate contractual agreement.

[187] This was a common labour hire agreement, which does not mean that it could not in practice have amounted to an employment relationship, had the evidence regarding the real nature of the relationship reflected that.

[188] In this case, the Authority considered that the parties' intention was not undermined by an application of the common law test or by a review of how the relationship operated in practice.

[189] The mere fact that an independent contractor may be doing the same or similar work as an employee within a similar structure (for example, not using their own

materials or tools and only providing services to an organisation with clear deliverables and parameters) does not automatically mean that they must be an employee.

[190] It is lawful for an organisation such as MSD to engage an expert and highly skilled external resource in order to address resource shortages or undertake specific projects for a limited duration.

[191] Each case involving a dispute about whether or not the applicant was an employee in terms of the definition in s 6 of the Act turns on its own unique and specific circumstances.

[192] There will always be factors that tend to indicate a contractual arrangement and those that tend to indicate an employment relationship. What the Authority has had to do is stand back and weigh up the overall evidence, without treating the parties' intentions as definitive, and without giving precedence to any one factor.

[193] Having done that exercise, the Authority was not satisfied that Mr Z was an employee of either Taska and/or MSD. The parties did not intend for there to be an employment relationship, a contracting arrangement suited all involved, and the parties had not acted as if there was an employment relationship during the engagement.

[194] Accordingly, the Authority does not have jurisdiction to investigate any of the claims Mr Z has made against each respondent.

What costs should be awarded?

[195] Taska and MSD as the successful parties are entitled to a contribution towards their actual legal costs. The parties are encouraged to resolve costs by agreement, based on the Authority's usual notional daily tariff based approach to costs.

[196] This matter should be treated as involving half a day of investigation meeting time, for the purposes of assessing costs. The notional starting point is therefore \$2,250, being half of the one day notional daily tariff of \$4,500.

[197] If a costs determination is required, the parties are invited to identify factors they say should result in the notional starting tariff being adjusted. The following timetable for costs submissions applies:

- (a) Taska and MSD have 14 days from the date of this determination, to lodge their costs submissions;
- (b) Mr Z has 14 days from receipt of the respondents' costs submissions to lodge his costs submissions. If he does not intend to lodge any costs submissions then he needs to advise the Authority of that as soon as he can.

[198] No submissions will be accepted outside this timetable, without the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority