

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 159  
3260979

BETWEEN	LUKE BOYES Applicant
AND	LUKE'S MISTAKE LIMITED First Respondent
	KEITH WILLIAMS Second Respondent
	MARTIN COOKSON Third Respondent

Member of Authority:	Peter van Keulen
Representatives:	Shaun Cottrell, counsel for the Applicant Peter Moore and Alex Sawirs, counsel for the Respondents
Investigation Meeting:	19 July 2024 in Christchurch
Submissions and Further Information Received:	19 July 2024, 21 November 2024 and 19 December 2024 from the Applicant 19 July 2024, 22 July 2024 and 9 December 2024 from the Respondent
Date of Determination:	17 March 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] In May 2021 Luke Boyes and Keith Williams agreed to set up a tyre importing and supply business (the Business). The basic premise of their joint undertaking was that Mr Boyes would provide expertise and labour in respect of sourcing, supplying and fitting tyres

and Mr Williams would provide the capital and business expertise.

[2] Mr Boyes says that when he worked in the Business he did so as an employee but he was treated as a contractor and as a result he has various employment related claims against the respondents.

[3] The respondents deny that Mr Boyes was an employee and say at all times he was an owner operator of the Business effectively in partnership with Mr Williams.

[4] The respondents also say that if Mr Boyes was an employee he did not raise a personal grievance in connection with his various claims within the requisite 90-day period.<sup>1</sup>

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

[5] The parties agreed that I would deal with the respondents' objections as preliminary issues; the preliminary issue to be resolved being:

(a) What was Mr Boyes' status when he worked in the Business.

(b) And, if Mr Boyes was an employee, did he raise his personal grievance within the required 90-day period?

[6] I investigated these preliminary issues by receiving written evidence and documents, holding an investigation meeting on 19 July 2024 and assessing the written submissions of the parties' representatives.

[7] 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.

[8] 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.

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<sup>1</sup> Employment Relations Act 2000, s 114.

## Assessment of Mr Boyes' status

### *The issues*

[9] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Act. The way to apply s 6 of the Act is set out in *Bryson v Three Foot Six Ltd.*<sup>2</sup> and the recent decision of the Court of Appeal in *Rasier Operations BV v E Tu Incorporated.*<sup>3</sup> This is:

- (a) First, I must consider the terms of engagement between the parties to establish if there is a common intention, which may indicate the nature of the relationship.
- (b) Second, I must consider how the work was carried out in practice, identifying divergences from the agreed terms of engagement.
- (c) Third, based on how the work was carried out in practice, I must apply three relevant common law tests, the results of which will support an employment relationship or a contractor relationship. These tests are:
  - (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.

[10] I will consider each of these steps to decide if the operation of the Business was such that Mr Boyes was an employee.

### *Parties' intentions*

[11] Mr Boyes and Mr Williams first met when Mr Boyes was managing a tyre shop,

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

<sup>3</sup> *Rasier Operations BV v E Tu Incorporated* [2024] NZSC 177.

Supertyre. Mr Williams' wife, Maria Williams, operated a business that supplied truck rims and that business stored stock in a warehouse that was part of the Supertyre business. Mr Boyes had been responsible for stock control whilst the rims were in the Supertyre warehouse, which is how he met Mr and Mrs Williams.

[12] When Mr Boyes left Supertyre, he and Mr Williams discussed setting up a tyre supply business. Mr Boyes and Mr Williams dispute who contacted the other first about starting a business together. Regardless, the end result was that in May 2021 Mr Boyes and Mr Williams agreed to go into business together and they recorded that agreement in a handwritten document labelled "Heads of Agreement".

[13] Based on the Heads of Agreement and evidence from Mr Boyes, Mr Williams and Martin Cookson, an accountant who advised Mr Williams and did accounting for the Business, I conclude that the parties' intentions for the operation of the Business were as follows:

- (a) The business would be a tyre importing and fitting business, primarily focussing on commercial work (fitting tyres and associated work for trucks and industrial vehicles).
- (b) Mr Boyes would provide his tyre expertise and labour to run the operational side of the Business.
- (c) Mr Williams would provide finance, initially a loan up to \$100,000 as start up capital, and business expertise by way of mentoring to Mr Boyes.
- (d) To protect his investment Mr Williams would hold 100% of the shares in the company that would be established as the entity that the Business would be owned and operated through. Mr Boyes would be a director of this company.
- (e) Mr Williams would take the equivalent of the net amount of a \$90,000 salary from the Business as regular payments for his living costs. These payments were to be an advance of any profit due to Mr Boyes, so were a loan from the Business to be repaid from Mr Boyes' profit.

- (f) The profits of the business would be split equally between Mr Boyes and Mr Williams. Mr Boyes' share would repay any advance payments he had taken from the Business and Mr Williams' share would repay the personal loan he had made to the Business.
- (g) Whilst Mr Williams was to hold 100% of the shares in the company established for the Business, the ownership of the Business was 50% each between Mr Boyes and Mr Williams. Once Mr Williams' loan to the Business had been repaid from profit, 50% of the shares in the company would be transferred to Mr Boyes to reflect his share in the Business.
- (h) Once 50% of the shares were transferred to Mr Boyes, so effectively once Mr Williams' loan to the Business had been repaid, Mr Boyes and Mr Williams would agree terms for the purchase of Mr Williams' 50% shareholding (and ownership of the Business) by Mr Boyes. The end result being that Mr Williams would cease to have any interest in the Business and it would be solely owned and operated by Mr Boyes.

[14] It is clear from the negotiations and how the work commenced that Mr Williams and Mr Boyes intended to operate their relationship on a partnership basis with a limited liability company being the entity through which the partnership business - the Business - would operate. Mr Boyes was to run the Business with a high level of autonomy and he would be paid an advance on any profit from the Business/partnership for his living expenses. So, the intention was that Mr Boyes would be a 50% owner operator in the Business being paid his share of profit from the Business/partnership with Mr Williams, albeit in advance of any profit being made. The initial intention of the parties was that Mr Boyes was not working or being paid as an employee but as a partner in the Business.

#### *Ongoing performance*

[15] As initially agreed, the Business was operated through a company, which in June 2021 when the Business commenced was called B. A. W. Limited (the Company); the Company's name was changed to Luke's Mistake Limited in August 2023 and then changed again to Boyes and Williams Limited in July 2024.

[16] The Company had been incorporated in October 2005 and was owned initially by Mr Cookson. In June 2021 Mr Williams was to have 100% of the shares but for accounting and financial reasons Mr Cookson retained 80% of the shares and Mr Williams owned the other 20%. At this time Mr Cookson and Mr Boyes were the directors.<sup>4</sup>

[17] In order to commence trading the Business required premises to operate out of, tools and equipment and a vehicle. These were all obtained through the loan advanced by Mr Williams except for some tools that Mr Boyes already had.

[18] The Business was operated primarily by Mr Boyes and then after time through employees managed by Mr Boyes.

[19] The work undertaken through the Business was focussed on commercial tyre work.

[20] Mr Boyes established a customer base through his previous experience and contacts and then through the goodwill and operating profile of the Business; Mr Williams had no input into establishing and maintaining the customer base although he did at later stages of the operation of the Business become involved in pursuing payment of overdue invoices.

[21] Mr Boyes either undertook the work of the Business or managed the employees who did this. Mr Williams did have some input with the employees of the Business although it was difficult to establish the extent of this – Mr Boyes described Mr Williams as being constantly involved but failed to provide sufficient examples to establish such a pattern. It is clear that nearer the end of the partnership and the operation of the Business Mr Williams spent more time at the Business premises.

[22] A lot of the commercial tyre work undertaken by the Business was done on site for customers. This involved Mr Boyes inspecting any trucks or industrial vehicles for issues with tyres such as punctures and poor condition. Mr Boyes would then undertake work required such as repairing punctures, replacing tyres and doing wheel alignments. This work would be undertaken in consultation with the customers and tyres and parts would be ordered as required – Mr Boyes did not require approval from Mr Williams or Mr Cookson to

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<sup>4</sup> In May 2023 Mrs Williams became a director of the Company and in August 2023 Mr Boyes ceased being a director of the Company.

undertake this work including ordering necessary parts.

[23] A lot of this work was done outside of normal business operating time, so evenings, early mornings or Saturdays when the vehicles being inspected and serviced were not being used by customers; Mr Boyes managed his time and employees time around the customer needs.

[24] The Business also had a service centre (workshop) where tyre repair or replacement could be undertaken. This workshop operated mainly Monday to Friday from 8:00 am to 5:00 pm although in the early period of operation this varied depending on Mr Boyes' availability. There was a limited amount of tyre work for cars generated through the workshop.

[25] In addition to undertaking tyre fitting, repair and associated services, Mr Boyes ordered stock as needed, approved employee hours for payroll purposes, set pricing for work undertaken, invoiced customers and liaised with customers generally in terms of developing business.

[26] In the course of doing this work Mr Boyes treated himself more as an owner operator than an employee:

- (a) He identified himself as the managing director of the Business and was the “boss” in terms of employees and the work undertaken.
- (b) He worked hours that suited him or as the Business' customers required.
- (c) He referenced his remuneration from the Business as a loan from the Company,<sup>5</sup> which is consistent with an owner operator taking shareholder drawings or paying themselves a shareholder salary.<sup>6</sup>
- (d) He did not request or take employee benefits such as sick leave, annual leave or public holidays.

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<sup>5</sup> Including in matrimonial property proceedings in Court.

<sup>6</sup> Initially Mr Boyes was not a shareholder in the Company and therefore did not have a shareholder account to draw his payments from. In October 2022 Mr Boyes obtained a 10% shareholding in the business from Mr Cookson and the money he had been paid as well as the ongoing payments he took were recorded in his shareholder account.

[27] Based on this assessment of how the Business operated I am satisfied that it was in line with the parties' original intention; Mr Boyes and Mr Williams operated a partnership in which Mr Boyes developed and undertook the work for the Business and Mr Williams provided the finance required and business mentoring support for Mr Boyes.

[28] However, the partnership and the operation of the Business did not always run smoothly. In 2022 Mr Boyes wanted to draw more money from the business and his solution was to become an employee - this was rejected and he was told by Mr Williams that the Business needed to generate more revenue or reduce some costs through smarter work practices to improve profit for drawings. To this end Mr Williams was working with Mr Boyes in his role as business mentor.

[29] As Mr Williams worked with Mr Boyes, he became concerned about some of Mr Boyes' transactions – in short, he says he was concerned that not all work was being attributed to the Business and that Mr Boyes was obtaining some unauthorised personal benefits from operating the Business. None of these allegations were proven but for my purposes the evidence explained why Mr Williams began taking a more active role in the operation of the Business. However, that active role was in connection with finances and ensuring Mr Williams had oversight of the Business revenue.

#### *Control test*

[30] The control test involves looking at the work Mr Boyes did and assessing who had control over the work Mr Boyes did and when he did it.

[31] There are various aspects of control in terms of Mr Boyes' involvement in the operation of the Business:

- (a) Mr Boyes developed the customer base and the work undertaken by the Business. He controlled what work was done and for what customers. It is clear that Mr Boyes had a large amount of discretion in terms of developing the business and then doing the work required.
- (b) Mr Boyes had a reasonable amount of control over the Business expenditure – he could order stock and parts as required for the work being done, he

authorised payments for employees and other Business costs. The only proviso was that two sign offs were required for some Company expenditure such as employee payments and more latterly Mr Williams required additional approval for some expenditure.

(c) Mr Boyes largely controlled the income for the Business – he developed business with customers, and he set terms of work including the pricing.

(d) Mr Boyes largely set his own time for work except to the extent that actual customer need impacted on times available for him to work.

[32] In contrast, Mr Boyes says Mr Williams was controlling him and his work – but his evidence did not support this. I accept that Mr Williams spent more time at the Business premises as the Business developed but this was because of concerns over some of Mr Boyes' management – I see this as Mr Williams protecting his investment and having more direct input in terms of his business mentoring role. There is no evidence to indicate that Mr Williams was exerting control over work undertaken by the Business – he did not have the expertise, customer contacts or even the knowledge of the workflow to be able to do this.

[33] Overall Mr Boyes had control over the work he did; he generated much of the work done by the Business and therefore decided what he and others would do and he arranged his work and the work undertaken by others as suited the Business operational requirements (i.e. to meet customer demand) and as suited his own requirements. In this respect he operated as an owner operator and not an employee.

[34] The control test does not support a finding of Mr Boyes being an employee.

#### *Integration test*

[35] Given the circumstances of how the partnership and the Business operated I conclude that the integration test is of little value in assessing whether Mr Boyes was an employee.

[36] Mr Boyes was the face of the Business in terms of expertise, customer relationships, and operations so he was fully integrated into it. This equally reflects Mr Boyes being an owner operator as it reflects him being an employee.

[37] I have already determined that Mr Boyes operated his involvement in the Business as a partner and an owner operator the Business – and this explains the level of integration.

#### *Fundamental test*

[38] The fundamental test is an assessment of whether Mr Boyes was operating a business for his own reward.

[39] In recent cases the Employment Court has placed considerable emphasis to this factor given the changing nature of New Zealand's work force and working conditions.<sup>7</sup> The Court's approach has focussed in on whether the individual served their own business or the hirer's business.<sup>8</sup> The emphasis being on understanding for whose benefit, in a commercial sense, the work is undertaken – for the hirer or for the worker.

[40] It is clear to me that the Business was operated for the benefit of both Mr Boyes and Mr Williams as a partnership. The benefit for Mr Boyes was he could establish a business through finance from Mr Williams, obtain advance payments on profit and then use overall profit (in time) to purchase Mr Williams' share. The benefit for Mr Williams was a return on his investment by repayment of his loan from profit and then the sale of his share – so a profit on his investment based on the value of the Business when his 50% share was purchased by Mr Boyes.

[41] The fundamental test indicates that Mr Boyes was not an employee, he was a partner in the Business and ultimately the operation of the Business was for his own reward.

#### *Conclusion*

[42] I conclude that Mr Boyes was in partnership with Mr Williams and operated the Business as an owner making his own choices about the work undertaken and the development of the Business for his own benefit; Mr Boyes was not an employee.

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<sup>7</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.

<sup>8</sup> *Leota* above n 3 at [38]; and *Barry* above n 3 at [3].

### **Mr Boyes' personal grievance**

[43] As Mr Boyes was not an employee of any of the respondents, he cannot have a personal grievance against any of them. It follows that I do not need to consider the second issue of whether a personal grievance was raised within the requisite 90-day period.

### **Orders**

[44] Mr Boyes was not an employee of any of the respondents and I do not have jurisdiction to investigate any of his claims.

### **Costs**

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

[46] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Mr Boyes will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[47] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>9</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>9</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)