IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 82
EMPC 331/2020

IN THE MATTER OF	an application for declaration under s 6(5) of the Employment Relations Act 2000
BETWEEN	ROSS BARRY Plaintiff
AND	C I BUILDERS LIMITED Defendant

Hearing:	15-16 March 2021
Appearances:	G Pollak, counsel for plaintiff J Burley and D S Pala, counsel for defendant
Judgment:	2 June 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

---

[1] Mr Barry spent around three years working for a building company, C I Builders Ltd (CIB). Mr Barry says that he was an employee; CIB says that he was an independent contractor. The Court has been asked to resolve the issue. If Mr Barry is declared to have been an employee, he can pursue a personal grievance claim against CIB. If he was an independent contractor, he has no rights under the Employment Relations Act 2000 (the Act), including the right to claim that he was unjustifiably dismissed.

[2] There is no dispute that it was made clear from the outset that Mr Barry was being engaged as an independent contractor. The dispute relates to whether the label

ascribed to Mr Barry's status accurately reflected the real nature of the relationship and the relative weight that ought to be given to party intention for the purposes of s 6.

Framework for analysis

[3] Counsel were agreed as to the applicable framework for analysis. It was recently summarised in *Leota v Parcel Express Ltd* (a case involving courier drivers). There the status issue (employee or independent contractor) was described as follows:[1]

> [30] An employee works for the employer, within the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[4] The Court observed that contracting arrangements were part of the evolution of work in New Zealand and the way it was structured. It also observed that while a particular model of working may be commonplace within a particular industry, it did not follow that the commonly adopted model reflected the real nature of the relationship.[2]

[5] Section 6 of the Act is the starting point. It provides:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> …
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the court or the Authority—
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

---

1 *Leota v Parcel Express Ltd* [2020] NZEmpC 61, [2020] ERNZ 164.
2 At [54].

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

…

[6] As s 6(2) makes clear, the task for the Court is to determine the real nature of the relationship. As s 6(3) makes clear, the mutual intention of the parties (if it can be ascertained) will be relevant to undertaking that task, as will the way in which the parties may have labelled their relationship. But what is equally clear from the express wording of s 6(3)(a) and (b), is that neither intention nor labelling are determinative: both are pieces of the larger s 6(2) real-nature-of-the-relationship puzzle. If it were otherwise, the underlying purpose of s 6 in particular, and the objectives of the legislation more generally, would be undermined. In this regard one of the objectives of the Act is to acknowledge and address the inherent inequality of bargaining power.[3] As the explanatory note to the Employment Relations Bill 2000 made plain, the Employment Relations Act was designed to provide a better framework for employment relations, and to recognise that the relationship was not simply a contractual, economic exchange.[4]

[7] The underlying policy intent of what was to become s 6 was to "stop some employers labelling individuals as "contractors" to avoid responsibility for employee rights such as holiday pay and minimum wages."[5] Mr Pollak, counsel for Mr Barry, essentially submits that this is what is occurring within segments of the construction industry and is what occurred in this case.

[8] In *Bryson v Three Foot Six Ltd (No 2)*, the Supreme Court emphasised the importance of analysing the way in which the relationship has operated in practice, saying that it was "*crucial* to a determination of [the relationship's] real nature". Such an analysis takes into account any features of control and integration (commonly referred to as the control and integration tests), and any indications as to whether the contracted person has been effectively working on his/her own account (commonly

---

3 Section 3(a)(ii).

4 Employment Relations Bill 2000 (8-1) (explanatory note) at 1. See too *Leota* at [31]; *Prasad v LSG Sky Chefs Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [18]-[19].

5 Employment Relations Bill 2000 (8-2) at 5-6.

referred to as the fundamental (economic reality) test).[6] Boiled down to its essentials, the key questions is: was Mr Barry serving his own business or CIB's business?[7]

[9] There are, as the cases reflect, a number of factors that may point towards, or away from, an employment relationship. A table of the usual indicia, which was set out in *Leota*, was referred to by both parties.[8] It provides a useful tool for analysing the facts, and their potential significance, in this case. The table is annexed to this judgment as Appendix 1.

[10] I start with the way in which the relationship was characterised at the outset as this factor assumed some importance during submissions.

Did the agreement describe Mr Barry as an independent contractor?

[11] Answer: Yes. While no written agreement was entered into, the agreement which did exist suggests that the parties intended to structure their relationship as one of hirer/independent contractor.

[12] Mr Ireland runs CIB with his wife, Ms Newnham. Mr Barry was recommended to Mr Ireland by another builder. Mr Barry had worked for that person on two separate occasions over the years – for one three-year period as an independent contractor and for a brief period as an employee. At the time Mr Barry was referred to Mr Ireland he had been out of paid work for three years.

[13] Mr Barry met with Mr Ireland at a café. Ms Newnham was also present. There was some dispute as to who said what to whom, but it was clearly an amicable meeting which resulted in a handshake agreement that Mr Barry would start work with CIB two days later. Mr Ireland made it clear that the role was being offered on a contracting basis, and he specified the terms with regards to ACC levies, the rate of pay (there being a difference of recollection on the hourly rate which does not need to be resolved

---

6 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32].

7 *Leota,* above n 1, at [38].

8 *Leota*, above n 1, at [38] citing Andrew Stewart *Stewart's Guide to Employment Law* (6th ed, The Federation Press, Sydney, 2018) at 56.

at the s 6 status determination stage), holiday pay, invoicing and withholding tax. Where the evidence diverges is the extent to which Mr Barry suggested that he wanted such an arrangement. Mr Ireland said that Mr Barry had made it clear he was familiar with this form of arrangement and that he appreciated the flexibility that would come with it. Mr Barry said that he simply accepted what he was offered.

[14] I accept that both understood that Mr Barry would be labelled an independent contractor. While Mr Ireland may have assumed that Mr Barry would appreciate a degree of flexibility, it would be artificial to view the benefits of such an arrangement as flowing in only one direction. As was made clear in the terms Mr Ireland set, under the contracting model CIB was not required to pay holiday pay; sick leave and other entitlements. Mr Barry could not join a union; he could not raise a personal grievance; and there were none of the protections afforded to employees at the end of an employment relationship.

[15] Mr Barry gave evidence that he did not really understand the difference between independent contracting and employment. Mr Barry's evidence as to his level of understanding must be seen in light of the fact that he was not a novice in relation to business matters, having previously set up and operated his own building services company, and having worked in both capacities prior to his engagement with CIB. However, his willingness to enter into the relationship on the basis identified by Mr Ireland (namely as an independent contractor) must also be seen in light of the fact that he was keen to get back into paid work, having been out of the workforce for a significant period of time. The point emerged in the following way in cross-examination:

> Q. That the meeting on the 15th of March 2017 extensively between you and Mr Cameron for the defendant he made it clear to you that he was engaging you as a contractor, you didn't challenge that either, did you?
>
> A. No, I was happy for the opportunity.

[16] Mr Burley, counsel for CIB, referred me to *Chief of Defence Force v Ross-Taylor*. There it was observed that:[9]

---

9 *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [30].

> It is a very serious matter for the Authority or the court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of their relationship is completely different.

[17] Mr Pollak, counsel for the plaintiff, submitted that there has been a discernible move away from a strict contractual approach and it is now well-established that intention is but one factor for the Court to weigh. I agree. As I have already observed, s6 focusses the analysis on the real nature of the relationship. Work might be offered and accepted on a stated basis, but if the reality of the relationship in practice does not marry up, party intention will not operate to convert the relationship into something it is not. All of this is clear from the express wording of s 6 and the Supreme Court's judgment in *Bryson*.[10]

[18] While in *Ross-Taylor* Judge Travis expressed a concern not to unnecessarily disturb the parties' clear intention, regard was nevertheless had to the range of usual factors (including the common law tests which all pointed away from employment status) in reaching the ultimate conclusion that Mr Ross-Taylor was an independent contractor. And, as Chief Judge Colgan subsequently observed:[11]

> [The *Ross-Taylor*] judgment is clearly distinguishable on the facts from the present case and, if anything, reaffirms the judicial observation that such cases are "intensely factual" and determined accordingly.

[19] The facts of the present case also differ from those in *Ross-Taylor.* To the extent that *Ross-Taylor* is authority for the proposition that the parties' intention as to status creates a presumptive bar which a worker is then required to overcome by application of the common law tests, in order to obtain a declaration of employment status under s 6, I respectfully disagree. Intention is plainly a relevant factor, but I prefer to see it as part of the s 6 mix, to be taken into consideration with other relevant factors in assessing what the real (rather than described and/or intended) nature of the relationship was.[12] When s 6 is read in context, and in light of the legislative history,

---

10 See *Bryson*, above n 6, at [32].

11 *Franix Construction Ltd v Tozer* [2014] NZEmpC 159, [2014] ERNZ 347 at [44].

12 See, for example, the analysis in *Prasad*, above n 3. Compare *Horizon Concepts Ltd v Hayward* [2019] NZEmpC 75.

the clear indication is that the Parliamentary concern was to dilute the emphasis that might otherwise be placed on the intention of the parties, insofar as that could be discerned. If party intention was to have primacy it is highly likely s 6 would have been couched differently.

[20] The difficulties with adopting a contract-centred/offer and acceptance approach in assessing whether an employment relationship exists were recently touched on by the Supreme Court of the United Kingdom in *Uber BV v Aslam*, where Lord Leggatt observed that:[13]

> Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. *It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place.* The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker.

[21] It should not be forgotten that one of the key objects of the Act is to acknowledge and address the inherent inequality of power in employment relationships.[14] While true equality of contractual strength may be a feature in a limited number of employment relationships, there are significant dangers in assuming its presence. In this case the facts point away from the conclusion that Mr Barry and CIB (through Mr Ireland) entered into the relationship on an equal footing, including because Mr Barry was keen to return to the paid workforce, and had already missed out on one opportunity. While Mr Barry was plainly in a less vulnerable position than many other workers, the reality is that he simply accepted what he was offered. That is not uncommon, for obvious reasons.

[22] Ultimately s 6 is a protective provision, enabling the Court to reach its own view on whether an employment relationship exists. I do not think that it is useful to

---

13 *Uber BV v Aslam* [2021] UKSC 5 at [76] (emphasis added). While the different legislative contexts should be noted, including the "worker" category which is not present in New Zealand law, the UK utilises a similar purposive approach in assessing the reality of the relationship. Emphasis added.

14 Section 3(a)(ii).

ascribe different weights to each of the factors the Court might consider – much will depend on the individual facts of the individual case. What must, however, be kept firmly in focus is s 238 of the Act, which provides that:

> **No contracting out**
>
> The provisions of this Act have effect despite any provision to the contrary in any contract of agreement.

[23] In summary, I accept that the parties agreed at the outset that Mr Barry was to be characterised as an independent contractor. That points away from the real nature of the relationship being an employment relationship but is only one factor in assessing whether an employment relationship existed.

Did CIB have the right to exercise detailed control over the way the work was performed by Mr Barry?

[24] Answer: Yes.

[25] Mr Barry's evidence was that he worked under the strict direction and control of Mr Ireland and the relevant site manager. Mr Ireland disputed this, saying that Mr Barry was essentially left to get on with the tasks he had been set. Another worker for CIB gave evidence that Mr Barry tended to work on his own and in his own way. No site manager was called to give evidence.

[26] Mr Barry is a relatively experienced construction worker. I have no doubt that he was capable of, and did, complete tasks without needing to be closely supervised. The same could fairly be said of many experienced employees. The reality is that Mr Barry was told what he was to do and when. He moved between sites as directed by CIB; he picked up supplies for CIB as directed; he worked on particular jobs as directed; and the jobs he was working on would change – all at the direction and under the control of CIB. So, while the exercise of control was not consistently applied throughout each day of work, the key point is that CIB retained to itself the power to exercise control as and when it chose, to suit its business needs.[15]

---

[15] *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA) at 11; and as noted by the first question in the table of indicia in *Leota*, above n 1, at [38].

[27] While CIB gave evidence that Mr Barry had flexibility in terms of his work patterns, that is not reflected in the documentation before the Court. Rather, the records show a relatively consistent pattern of work hours per day, from week to week, and in terms of start and finish times. Further, Mr Barry worked consistently for CIB for an extended period of time. CIB's timesheets appear to show select occasions on which Mr Barry worked less than a 40-hour week but those periods include public holidays and also coincide with a sick day recorded by Mr Barry. As a result, they are of limited utility as a sample. Mr Barry also gave evidence that the hours worked on certain days could be influenced by a variety of factors including weather and the availability of work. The short point is that the hours worked on a construction site do not mirror the regularity of office hours.

[28] Mr Barry was expected to turn up each day and work a full day. He gave evidence, which I accept, that while he did not put in leave forms, he did advise either a site manager or Mr Ireland if he was proposing to take time off or leave early. When the records are viewed in context, and over a three-year period, they cannot be said to reflect any real flexibility. The reality is that during that three-year period he worked an average of 40 hours per week and took an average of just over four weeks off per year (most of which were taken in order to meet childcare commitments during school holidays). He did not undertake work for anyone else during the three-year period. All of his work was for CIB.

[29] I do not accept that Mr Barry exercised any real degree of autonomy over his work with CIB. Rather, CIB decided what Mr Barry was to do, when and where. All of this points towards the real nature of the relationship being an employment relationship.

Was Mr Barry integrated into CIB's organisation?

[30] Answer: Yes.

[31] This part of the inquiry is focussed on whether the person is part and parcel of, or integrated into, the work operation of the putative employer. The integration test is not, however, solely concerned with the nature of the work being performed. Factors

such as the duration of the work (for example, if the role is fixed term or temporary), training and reporting requirements, and the practical operation of the business relationship agreed to by the parties may also be relevant.[16]

[32] Mr Barry worked with a team of workers on various projects, from day to day and week to week over the course of an extended period. From time to time he drove a company vehicle featuring the CIB logo to collect building supplies and to travel between sites and there was nothing to externally differentiate him from any of the other workers on site. Any outsider looking in would likely conclude that he was well integrated into the company's operations. He reported to Mr Ireland who assigned his tasks and places of work. While it is true that he let Mr Barry get on with the tasks he was assigned in his own way, this is hardly surprising given Mr Barry's experience. The label accorded to workers on CIB sites appears to have made little difference in terms of the way work was conducted. Indeed, the evidence disclosed a degree of confusion as to the particular status of various CIB workers, underscored by the way in which the company approached the wage subsidy issue during the pandemic (a point I return to below).[17]

[33] The extent to which Mr Barry was integrated into CIB's operations points towards the real nature of the relationship being one of employment.

Was Mr Barry required to wear a uniform and/or display material that associates them with the CIB's business?

[34] Answer: No.

[35] Mr Barry was not required to wear a uniform, and there was no evidence that any person who was regarded as an employee of CIB was required to do so. As I have said, from time to time Mr Barry drove a company vehicle featuring the CIB logo between sites and to pick up supplies. On occasion he used his own vehicle. This factor is neutral in terms of determining the real nature of the relationship.

---

16 *Head v Commissioner of Inland Revenue* [2021] NZEmpC 69 at [260].
17 See below at [47]-[48].

Was Mr Barry free to work for others at the same time?

[36] Answer: There was no express prohibition on working for others but it was never raised as an issue and was unrealistic in any event.

[37] I did not understand CIB to be disputing that Mr Barry worked an average of 40 hours a week, continuously for around three years, for it. Mr Ireland gave evidence that Mr Barry could have done work for others, noting that he took some days off and left early on occasion. There was no evidence that Mr Barry did any work for anyone else during the time he was working with CIB and nor was there any contemporaneous evidence before the Court of an expectation that he might do so.

[38] Mr Barry's evidence, which I accept, was that he was working on average at least a 40-hour week for CIB over a three-year period; he had to travel into the city each day from Helensville (which he described as a 3 hour roundtrip); and he had responsibilities to his children during school holidays. The work that Mr Barry was doing for CIB was physical work. His trade was as an unqualified builder. While theoretically Mr Barry had available 24 hours a day, seven days a week to work, the reality is that his work for CIB left very little time, and I accept energy, to work for others. This is reflected in the fact he did not do so for the entire three-year period.

[39] This factor points towards the real nature of the relationship being one of employment.

Could Mr Barry subcontract the work or delegate performance to others?

[40] Answer: No.

[41] There was no evidence to suggest that Mr Barry was able to subcontract or delegate his work, and I inferred from the evidence that other workers on site had to cover if Mr Barry was not there. This factor points towards the real nature of the relationship being one of employment.

Was taxation deducted by CIB from Mr Barry's pay?

[42] Answer: Yes.

[43] Withholding tax was deducted from Mr Barry's pay each week. Mr Barry also made ACC contributions for a period of time during the initial period of his time with CIB. Both point away from the real nature of the relationship being one of employment, but likely simply reflect the way in which the relationship was characterised at the outset by Mr Ireland.[18]

[44] It is also notable that Mr Barry did not invoice CIB, unlike others who did contract work for the company. Rather, he provided screen shots of his hours of work each week to Ms Newnham who then sent invoices to CIB's clients. The way in which these matters were handled points towards the real nature of the relationship being one of employment.[19]

Did Mr Barry receive paid holidays or sick leave?

[45] Answer: No.

[46] Mr Barry took an average of around 22 days off each year over his three years with CIB, along with public holidays and a number of sick days. He was not paid for any of these days.

[47] The way in which leave was dealt with over an extended period of time, by both parties, points away from the real nature of the relationship being one of employment.

[48] There is a further point to note. CIB applied for and was granted a wage subsidy in respect of its employees during Level 4 lockdown in April 2020. It listed Mr Barry as one of its employees and received a subsidy in respect of him. There was

---

[18] Note the caution expressed in *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 that: "Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

[19] See also *Bryson*, above n 6, at [56]. In that case invoices were generated by the company, rather than by Mr Bryson.

limited evidence before the Court in respect of this issue. The only correspondence was an email sent by Ms Newnham to CIB's accountant on 10 June 2020, noting that a mistake had been made. The email came a week after Mr Barry's time with the company had come to an end and he had raised the issue of his employment status with CIB.

[49] It remained unclear why CIB would have thought it necessary to include Mr Barry in its application had it genuinely regarded him as being in business on his own account. And even accepting that the inclusion of Mr Barry in CIB's application for a wage subsidy was an error, it seems to me to be illustrative of the level to which Mr Barry, despite his 'independent contractor' label, had been integrated into the company.

Was Mr Barry required to supply his own tools and equipment?

[50] Answer: No.

[51] While Mr Barry had his own tool belt with small tools in it, all other tools and equipment which he used to undertake his work were provided by CIB. I accept Mr Barry's evidence, which I did not understand Mr Ireland to dispute, that it is common for construction workers to have a small selection of personal tools. The fact that he had his own tool belt does not, in context, weigh in favour of independent contractor status. The fact that CIB supplied all other tools and equipment points towards the real nature of the relationship being one of employment.

Was Mr Barry paid according to task completion, rather than receiving wages based on time worked?

[52] Answer: No.

[53] Mr Barry worked continuously for CIB for a lengthy period of time and was regularly paid each week, for each of the hours he worked. This factor points towards the real nature of the relationship being one of employment.

[54] Mr Ireland gave evidence that Mr Barry's rate of pay ($35 or $36 per hour) was higher, as a contractor, than he would have been paid as an employee. That evidence is not strongly supported by the documentation of pay rates across each of CIB's workers. It was acknowledged that Mr Barry's rate of remuneration took into account factors such as his experience and his ability to work unsupervised. A comparison was made by Mr Ireland to a hammer hand who was made an employee after Mr Barry's exit on an hourly rate of $27 gross. This comparison is complicated by the fact that that person is now employed as an apprentice (as Ms Newnham confirmed in cross-examination) and the lack of detail provided on his previous experience or the level of supervision he required. The point is that I am not satisfied that a substantially different starting rate would have been negotiated had the parties classified their relationship as one of employment from the outset. It should also be noted that the rights and obligations under the Act cannot simply be contracted out of in exchange for a higher rate of remuneration.

Did Mr Barry bear any risk of loss, or conversely have any chance of making a profit?

[55] Answer: No.

[56] Mr Barry had no opportunity to make a profit. He was paid a set amount for each hour worked and was expected to work five days a week. There was no business for him to sell. This points away from the real nature of the relationship being one of employment.

Does any business goodwill accrue to the hirer?

[57] Answer: Yes.

[58] There was no business to which Mr Barry could accrue any intangible benefit. CIB dealt with client relations and enquiries and, as noted, to an external observer such as a client, he would not be differentiable from the CIB business. Any goodwill generated by Mr Barry's skill, labour or work ethic accrued to CIB. This factor points towards the real nature of the relationship being one of employment.

Use of the contractor model in the construction industry

[59] Evidence was given by the General Secretary of Amalgamated Workers Union (AWUNZ), Mr Davis. AWUNZ is the largest construction industry union in Aotearoa and one of the largest private sector unions. It has approximately 8000 members. Mr Davis gave evidence that it is increasingly commonplace for construction businesses, particularly smaller ones, to engage less skilled and specialised workers on an hourly basis, ostensibly as independent contractors. He said that this had the effect of shielding such businesses from the liabilities and obligations associated with employing staff.

[60] Mr Davis explained his understanding of what was occurring in the construction industry in the following way:

> … I am aware also, that increasingly there is a tendency to engage less skilled and less specialized workers on an hourly basis. … In my experience, such arrangements are created solely to avoid statutory entitlements including the right to organise and engage in collective bargaining. Such arrangements allow the owner of the site to generally do what ever he or she likes. The effect is that such employees are denied all employment protections including the right to pursue personal grievances, to be consulted about loss of employment, redundancy rights, holidays, return to work rights such as limited duties after an accident etc.
>
> …
>
> The end result, of course, for my Union, is that most such workers labelled as contractors, are not members of the Union and there is little that we can do for them should a request for assistance be made to us. It is next to impossible for the Union to organise such workers and, should this occur or even be attempted, the usual consequence would be that the contractual relationship between the site owner and the worker could be terminated.

[61] Mr Davis distinguished this type of engagement within the construction industry from what he described as genuine contracting businesses who compete for work (generally by tendering) and who include, for example, tradesman builders, scaffolders, welders, drain layers, electricians, plumbers and the like. Such contractors, he said, tend to work across sites and come on to a particular site for a particular project related to their particular speciality and leave when the project is completed.

[62] CIB did not seek to argue that the way in which it approached the relationship with Mr Barry was consistent with industry practice and that this weighed in favour of a finding that he was correctly characterised as an independent contractor. Rather, it was submitted that evidence as to industry practice was irrelevant to the Court's determination.

[63] It is true that the Court is concerned with Mr Barry's status and it is also true that Mr Davis was not purporting to give evidence as an expert. However, Mr Davis was able to give helpful evidence about what goes on in an industry he is very familiar with, and it provided useful background context. Equally, this case provides a useful opportunity to emphasise that it is the way in which a relationship operates in practice which will ultimately determine status and the rights and liabilities that accrue, not a label that may have routinely been applied within an industry to describe the relationship. In this regard, Mr Pollak referred to the following observation in *Leota*:[20]

> While I accept that industry practice may be relevant to assessing whether a worker is an employee in some cases, I consider that it is a factor best approached with caution. That is because it may lead to the tail wagging the dog. The mere fact that an industry considers that its workers are engaged as independent contractors cannot, of itself, be enough. It may simply reflect a mistaken understanding as to the actual legal status of some or all of its workers. The point is that if Parliament had intended those working within a whole industry to be categorised as independent contractors, it is likely it would have said so rather than imposing a fact-specific, case-by-case test which the Court must work through, applying s 6. In this regard it is notable that Parliament has not chosen to make special provision for courier drivers, unlike sharemilkers and real estate agents (s 6(4)), volunteers (s 6(1)(c)), and certain persons engaged in film production (s 6(1)(d)).

Conclusion

[64] Each case must be seen in its own factual context. The factors in this case point both ways. I accept that they are not clear cut. However, overall I am satisfied that the factual context points more firmly towards the real nature of the relationship being one of employment.

[65] Mr Barry was effectively providing personal service to CIB. He was not, in reality, operating a business on his own account. Rather he was working for CIB, in

---

[20] *Leota*, above n 1, at [54].

CIB's interests. The factual context in other cases involving a worker in the construction industry may support a different outcome.[21]

[66] My conclusions as to the real nature of the relationship in this case are underscored by the way in which CIB appears to have dealt with some of its other workers, and the fluidity with which it has been prepared on occasion to move between employee/independent contractor status. I understood Mr Ireland to say that a decision to switch a worker from independent contractor to employment status had much to do with the extent to which they were regarded as reliable and technically competent. While Mr Ireland did not accept the proposition, the way in which this issue appears to have been approached by CIB has a number of similarities with trial and probationary periods. The difficulty is that trial periods and probationary periods are expressly permitted under the Act. Both are constrained in terms of the circumstances in which they can be used and the criteria which apply.

[67] The independent contractor model is not an alternative which enables hirers to assess, by other means, suitability for employment. A worker either is, or is not, properly categorised as an independent contractor. Proper categorisation depends on the nature of the relationship and the way in which it operates. It does not depend on the convenient application of a name tag. As was recently observed in *Fleming*:[22]

> Employment relationships are important. They are not to be viewed as a convenient device to shift liabilities away from the key players or to paint a distorted picture of reality. That is why Parliament has conferred on this Court the exclusive jurisdiction to determine, on a case by case basis, whether a particular individual is an employee and (if so) of whom, and made it clear that the answer to that question emerges from a fact specific inquiry, rather than (for example) the way in which the relationship may have been characterised.

[68] I conclude, on the basis of the evidence before the Court, that the real nature of the relationship between Mr Barry and CIB was an employment relationship and make a declaration accordingly.

---

21 See for example *Sexton v Lowe* [2020] NZEmpC 25 where the Court found a contracted builder was not in an employment relationship in significantly different circumstances.

22 *Fleming v Attorney-General* [2021] NZEmpC 77 at [39].

[69] If the parties cannot agree costs I will receive memoranda, with Mr Barry filing and serving any application for costs within 20 working days of the date of this judgment; CIB filing and serving any response within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 5.40 pm on 2 June 2021

Appendix 1

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