

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 260
3269219

BETWEEN PAWANDEEPSINGH
DAVINDERSINGH KAHLON
Applicant

AND LEONARD BOURTON
Respondent

Member of Authority: Lucia Vincent

Representatives: Jack Hodgins, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 19 September 2024 in Christchurch

Submissions and Further Information Received: 19 September 2024 and 14 March 2025 from the
Applicant

Determination: 9 May 2025

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Mr Kahlon claims recovery of wages for work completed for Mr Bourton as an employee driving his truck.

[2] Mr Bourton says he never employed Mr Kahlon. He says his company, Farmers First Logistics Limited (in receivership) engaged Mr Kahlon as a self-employed contractor charging on a per load basis.

[3] During the investigation meeting Mr Kahlon conceded he performed the majority of his work for Mr Bourton or his company Farmers First Logistics Limited (in receivership) in the capacity of contractor paid on a per load work basis. He clarified his claim for work performed for Mr Bourton as an employee was for a total outstanding

of \$1,981.09 – an amount remaining unpaid for work performed of 73 hours which was different and in addition to the contracting arrangements.

[4] This determination deals with Mr Kahlon's only claim for work performed as an employee for Mr Bourton.

How did the Authority investigate?

[5] Mr Kahlon lodged a statement of problem on 18 December 2023. Mr Bourton was served on 23 December 2023.

[6] An Authority Officer wrote to Mr Bourton by way of letter dated 23 January 2024 noting the Authority had not received a statement in reply which was overdue.

[7] Mr Bourton contacted the Authority by way of email on 30 January 2024 about personal circumstances that warranted consideration by the Member. Taking these circumstances into account, the Authority paused any further steps for four weeks after which time the Authority contacted Mr Bourton to discuss extending time to allow a reasonable opportunity to provide a statement in reply.

[8] By way of email dated 7 March 2024, the Authority requested Mr Bourton lodge a statement in reply within 14 days. Mr Bourton did not respond.

[9] The Authority emailed the parties on 3 April 2024 to schedule a case management conference. This was scheduled for 22 April 2024. Upon request from Mr Bourton, the Authority rescheduled it to 6 May 2024.

[10] Mr Hodgins appeared as counsel for Mr Kahlon on the case management conference call. Mr Bourton also attended. The Authority made timetabling directions by agreement that included an investigation meeting scheduled for 20 August 2024 and that Mr Bourton would lodge and serve a statement in reply on or before 21 May 2024 along with a copy of a contract Mr Bourton had referred t.o. Mr Bourton did not do either of those things.

[11] After not receiving the documents Mr Bourton had agreed to provide, the Authority followed up with him on 23 May 2024. Mr Bourton indicated he would lodge the statement in reply by 27 May 2024. The Authority followed up with Mr Bourton again by email on 26 June 2024.

[12] Mr Bourton called the Authority on 26 June 2024. Among other things he asked for a blank version of a statement in reply to be sent to him to complete. An Authority Officer sent this and a statement in reply was lodged that same day. This was served on Mr Kahlon on 27 June 2024.

[13] Delays occurred in relation to evidence, timetabled to be lodged on 18 June 2024 for Mr Kahlon, from Mr Bourton by 9 July 2024, and from Mr Kahlon in reply on 30 July 2024. The Authority followed up in early July 2024. Mr Kahlon lodged his evidence on 16 July 2024. Mr Bourton was given until 11 August 2024 to provide his evidence.

[14] On 29 July 2024, Mr Bourton emailed the Authority advising he was overseas until 22 August 2024, two days after the scheduled investigation meeting. He asked for an adjournment, indicating rescheduling could be any time in mid-September. Mr Kahlon agreed to an adjournment.

[15] In an email on 2 August 2024, the Authority adjourned the scheduled investigation meeting, and offered the parties a rescheduled date of 19 September 2024, on the basis that Mr Bourton provided his evidence by 30 August 2024. Following further emails on 19 and 20 August 2024, both parties confirmed they were able to attend an investigation meeting on 19 September 2024. The Authority sent a notice of investigation meeting dated 21 August 2024 confirming details.

[16] Having not received any evidence from Mr Bourton, an Authority Officer contacted Mr Bourton by email on 9 September 2024 to advise that the Authority was waiting for his evidence.

[17] Having not heard from Mr Bourton any further, the Authority sent a reminder by email dated 18 September 2024 about the investigation meeting the next day.

[18] On the day of the investigation meeting on 19 September 2024, Mr Kahlon attended with his counsel. When Mr Bourton did not arrive, an Authority Officer called Mr Bourton three times without success, the calls appearing to have been disconnected without the ability to leave a message. An Authority Officer followed up by email to advise of this and that the investigation meeting was proceeding in his absence. Mr Bourton sent an email at 9:39am saying, "Sorry both my phone not working as I am currently in UK working sorry I only got your email about 20 mins ago. As no internet here."

[19] The Authority may proceed with an investigation meeting if a party fails to attend without good cause.¹ The Authority proceeded in Mr Bourton's absence because it was not satisfied there was good cause for the absence. Mr Bourton was aware of the time, date and location of the investigation meeting which had been rescheduled at his request at a time and on a date he had agreed to when he would be in the country to attend in person. Mr Bourton has not contacted the Authority to explain his absence or to provide any further information he may have wished to be considered.

[20] At the investigation meeting, the Authority heard evidence from Mr Kahlon under oath. Mr Kahlon's counsel gave oral closing submissions. Further detail was sought regarding Mr Kahlon's tax information. This was provided on 14 March 2025.

[21] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[22] The issues were:

- (a) For the purposes of his wage claim, was Mr Kahlon an employee?
- (b) If Mr Kahlon was an employee:
 - (i) Who employed him?
 - (ii) What (if any) wages are owing?
- (c) What (if any) orders should the Authority make as to remedies such as any unpaid wages and costs?

Was Mr Kahlon an employee?

What is the relevant law on who an employee is?

[23] Determining whether Mr Kahlon was an employee of Mr Bourton requires the Authority to apply the test set out in section 6 of the Act. Relevantly, the test says:

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee-**

¹ Clause 12A, Schedule 2, Employment Relations Act 2000 (Act).

- (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
 - (b) includes-
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who-
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer.
- ...
- (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 Authority-
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the person that describes the nature of their relationship.

[24] The Supreme Court outlined the principles relevant when determining when somebody is an employee under the section 6 test, starting with the definition of employee, "... a person of any age employed by an employer to do any work for hire or reward under a contract of service."²

... The section then requires the Court or the Authority, in deciding whether a person is employed under a contract of service, to determine "the real nature of the relationship between them". In doing so the Court or Authority is directed that it must consider "all relevant matters", including any matters that indicate the intention of the person. But it is not to treat as a determining matter any statement by the person that describes the nature of their relationship.

All relevant matters certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. All relevant matters equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be

² *Bryson v Three Foot Six Limited (No. 2)* ERNZ [2005] 372 at [31] to [32] (footnotes omitted), referred to by the Court of Appeal in *Rasier Operations BV & Ors v E tū Incorporated & Ors* [2024] NZCA 403.

possible to examine the relationship in light of the control, integration and fundamental tests.

[25] This approach was recently discussed by the Court of Appeal referring to a two-step process when asking whether someone is an employee under section 6 of the Act.³

In applying s 6 it is, we think, helpful to distinguish between two stages in the inquiry. The first stage involves identifying the substance of the parties' mutual rights and obligations as a matter of reality. The second stage involves determining whether those rights and obligations amount to a contract of service. The (modest) departures from the common law effected by s 6 are confined to the first stage of the analysis. Section 6 reinforces the common law requirement to focus on the substance of the parties' agreement when determining their mutual rights and obligations. It emphasises the importance of the real nature of the relationship, ascertained by reference to how that relationship operates in practice. And it emphasises that labels in the parties' agreement, or in other statements by the parties, are not determinative. At the second stage of the analysis, the common law test for what qualifies as a contract of service is applied to the (real) relationship between the parties. That continues to turn on the three common law tests: the control test, the integration test, and the fundamental test. Section 6 did not alter these common law criteria.

Put another way, clarity of analysis is enhanced by distinguishing between:

- (a) what is being classified (the agreement between the parties, which s 6 of the ERA requires the court to assess as a matter of reality, not form); and
- (b) the criteria for classification (the common law tests for classification of contracts as contracts of service).

Where there is a written contract governing the relationship between the parties, that will usually be the logical starting point for the first stage of the analysis. As the Supreme Court said in *Bryson*, "all relevant matters" in s 6(3)(a) "certainly include the written and oral terms of the contract between the parties". The Supreme Court also referred to "the need to begin by looking at the written terms and conditions which [have] been agreed to". In doing so, the focus is on the substance of the parties' mutual rights and obligations, interpreted objectively, rather than any labels that may have been attached to the relationship in the written contract.

[26] With these principles in mind, I look at what the parties agreed to with a particular focus on the substantive rights and obligations of the parties, how it operated in practice (including any deviations from it), and the common law tests of control, integration and fundamental (or economic reality).

³ *Rasier Operations BV & Ors v E tū Incorporated & Ors* [2024] NZCA 403, at [97] to [99] (footnotes omitted).

What did the parties agree and how did the relationship operate in practice?

[27] Mr Kahlon and Mr Bourton did not have a written agreement. They verbally agreed relatively few terms:

- (a) After Mr Kahlon said he could not survive financially on the contracting per load rate, Mr Bourton offered to employ Mr Kahlon on an hourly rate as a short-term solution. Mr Kahlon accepted this offer.
- (b) Mr Kahlon continued to drive Mr Bourton's truck for deliveries.
- (c) Mr Kahlon then reported his hours to Mr Bourton for payment on an hourly basis, with expenses paid as well.

[28] Mr Kahlon described what happened prior to being employed - how he tried to purchase a truck and trailer unit from Mr Bourton. He made the payment and expected his truck when he arrived in Taupō. That did not happen.

[29] Instead, Mr Bourton offered Mr Kahlon the use of his truck on or around 3 October 2023. Mr Kahlon said he then completed a number of deliveries using Mr Bourton's truck on a per load basis in the capacity as a contractor for Mr Bourton. On one occasion he arranged for a friend to complete the pickup. Mr Kahlon paid his own expenses. Invoices were issued on a per load basis primarily addressed to Farmers First Logistics Limited (in receivership).

[30] Mr Kahlon recalls discussing the financial difficulties he faced with Mr Bourton. The contracting on a per load basis was difficult to make financially viable - although the rate was higher, expenses were too. Mr Kahlon's truck was still not available, however. Mr Bourton offered to personally pay Mr Kahlon as an employee at the rate of \$34.00 an hour as a short-term solution. After working on this basis Mr Bourton personally paid Mr Kahlon \$5,676.11 on 26 October 2023. Mr Kahlon's bank statement confirms this.

[31] Mr Kahlon performed a further period of work driving for Mr Bourton as an employee, 73 hours' worth. Mr Kahlon sent Mr Bourton an invoice and on request from Mr Bourton, Mr Kahlon did this through his company to Mr Bourton in his personal capacity for \$4,846.10. Mr Kahlon says that he only received payment from Mr Bourton for some of that and is still owed \$1,981.09.

[32] A number of emails between Mr Kahlon and Mr Bourton were provided that discuss a range of matters. Mr Bourton refers to payment of wages in one of these emails - different to discussions about the per load payments for invoices for contracting work.

[33] Mr Kahlon says he sent an invoice from his company to Mr Bourton for his work as an employee because Mr Bourton asked him to. This was despite having agreed he would be an employee for this period of work. The invoice contains an hourly rate for hours worked and reimbursement of all expenses. It differed from the other invoice Mr Kahlon provided to the Authority which was addressed to Farmers First Logistics Limited (now in receivership) and charged on a kilometre / per load basis, with only one expense paid (RUC charges that had been arranged on Mr Bourton's behalf at his request). Mr Kahlon acknowledged he did his per load work in a contracting capacity and for a much higher fee, which the invoice provided shows.

Common law tests

[34] For the period of work Mr Kahlon says he did as an employee, Mr Bourton controlled Mr Kahlon more than when he did when Mr Kahlon contracted to his business. Mr Kahlon did not contract out the work he was doing like he did on one occasion when contracting. Mr Kahlon completed what was effectively a record of hours worked – different to the per load invoice that only recorded kilometres travelled and was sent to Mr Bourton's company.

[35] The economic reality of the remuneration arrangements support that Mr Kahlon worked as an employee when paid an hourly rate. Mr Kahlon pointed out that as an employee he was paid an hourly rate and had his expenses paid – to be contrasted with the much higher fee he would have received if he was contracting and covering his own expenses. That is evident from a comparison of one of invoices he sent as a contractor (absorbing most expenses) and one he sent as an employee (all expenses were covered). Although Mr Kahlon's tax information tends to suggest he categorised all work as a contractor, the economic reality of the relationship was otherwise when working for an hourly rate.

Conclusion on status

[36] There is merit in the distinction that Mr Kahlon makes between the per load work he performed for Mr Bourton's business, Farmers First Logistics Limited (in

receivership) when he absorbed most expenses, and the work he performed on an hourly rate basis for Mr Bourton (for which he was paid less but financially better off because all of his expenses were paid). Although it is unusual for an invoice to be sent when someone is working as an employee, this was a product of being eager for payment and doing what Mr Bourton had asked him to do. Similarly, although the tax information provided indicates Mr Kahlon did not treat the income received as an employee, tax status is not determinative of worker status.

[37] I am satisfied Mr Kahlon was an employee. Mr Bourton expressly said he would employ him and pay him an hourly rate plus expenses - different to the contracting arrangements. That reflected the real nature of the relationship in the limited context of work performed on an hourly basis as a short-term solution for the financial concerns raised by Mr Kahlon.

Who employed Mr Kahlon?

[38] Like the analysis under s 6 of the Act in determining who an employee is, identifying who an employer is an intensely factual exercise that requires the Authority to objectively assess the reality of a working relationship. Documentation (if any) may be relevant.⁴

[39] When working as an employee, Mr Kahlon says he worked for Mr Bourton in his personal capacity, not for his company. The invoice sent supports that, as does the payment in Mr Kahlon's bank account from Mr Bourton. I am prepared in these circumstances to find Mr Bourton personally employed Mr Kahlon.

What (if any) wages are owing?

[40] Beyond claiming he never employed Mr Kahlon, Mr Bourton has not engaged in the Authority's process to give evidence about what (if any) wages he says are (or are not) owed to Mr Kahlon, if the Authority found he was an employee.

[41] I am prepared to accept Mr Kahlon's calculations of what he is owed: \$1,981.09.

⁴ *Pilgrim v Attorney-General (No 2)* [2023] NZEmpC 227 at [18] and [19].

Costs

[42] This matter lasted less than half a day. Mr Kahlon was legally represented and has incurred legal cost in obtaining an order for wages owing to him.

[43] The Authority awards costs using a tariff-based system.⁵ Although Mr Kahlon claims \$4,500 in costs, it was unclear what legal work this related to (noting there was another matter being dealt with in a different forum). Given the time involved and circumstances of this case, it is reasonable to award a third of the daily tariff of \$1,500.

Summary of Orders

[44] The Authority orders Mr Bourton pay Mr Kahlon, within 28 days of this determination, the following amounts:

- (a) Wages of \$1,981.09; and
- (b) Costs of \$1,500.

Lucia Vincent
Member of the Employment Relations Authority

⁵ Clause 15, Schedule 2 of the Act and [Practice Direction of the Employment Relations Authority](#)