

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 402
3099532

BETWEEN MATTHEW McRANDLE
Applicant

AND PAUL MILNE LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Paul McBride, counsel for the Applicant
Tanya Kennedy, counsel for the Respondent

Investigation Meeting: 21 and 22 July 2020

Submissions [and further 22 July 2020 from the Applicant
Information] Received: 22 July 2020 from the Respondent

Date of Determination: 6 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Matthew McRandle has lodged several personal grievance claims with the Authority claiming amongst other things he has been dismissed from his employment with Paul Milne Limited on or about 18 February 2020. He also claims arrears of wages and other statutory entitlements he would be entitled to if he were an employee of Paul Milne Limited.

[2] Paul Milne Limited (PML) resists the claims, saying that at no stage was it in an employment relationship with Mr McRandle. It says the relationship was governed by a written independent contractor agreement and in any event it didn’t end that agreement, and if the agreement indeed has come to an end, then that has been occasioned by Mr McRandle.

[3] As a preliminary issue, and before Mr McRandle's personal grievance claims can be progressed, there is a need to decide whether or not Mr McRandle was an employee of PML or whether the services he provided to PML were as an independent contractor.

[4] In order to properly dispose of the matter the Authority has heard evidence from five witnesses, namely Mr McRandle, his partner Nikki Blair, Grant Bennett an ex-contractor for PML, Hamish MacDonald the sole director of PML, and Vaneta Shandil, the CEO of PML. The Authority also heard evidence as to how the relationship ended, the effect this had on Mr McRandle, and losses he had suffered.

[5] Issues the Authority is required to determine are:

- (a) What was the relationship between the parties?
- (b) If the relationship was that of independent contractor and principal, did that change during the course of the relationship?
- (c) If Mr McRandle was an employee of PML, what remedies flow from this?

The law

[6] Section 6 of the Employment Relations Act 2000 (the Act) 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
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[7] Accordingly, the Authority's ultimate enquiry must be focussed on determining the real nature of the relationship. Also at issue is what was the real intention of the parties when they

entered into their relationship. In *Leota v Parcel Express Limited* the Court set out a Table of Indicia to assist in an analysis of the working relationship.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?	✓	

¹ [2020] NZEmpC 61

Indicia	Employee	Independent Contractor
Does the agreement describe the worker as an independent contractor?		✓

Relevant matters

Entering into an agreement

[8] PML provides roofing services for the greater Wellington, Marlborough, Nelson and Tasman regions. In October 2016, PML placed an ad with TradeMe. Two versions of the advertisement were provided to the Authority, one by Mr McRandle (Appendix A to his reply brief of evidence) and the second by PML at the investigation meeting. PML says the advertisement was for a self-employed role. Indeed, the evidence of Hamish MacDonald, the director of PML, was that this model had been specifically chosen because his plan had been at some stage to franchise his business, and sell franchises. He hoped to create potential purchasers from the independent contractors he engaged as they grew the business.

[9] Mr McRandle gave evidence that he was looking for employment in New Zealand when he saw the job advertisement for PML on TradeMe and applied for it thinking it was for an employee role.

[10] Mr Bennett's evidence was that he did the hiring. He stated he interviewed Mr McRandle for a standalone contract position. His evidence was that he told Mr McRandle he was to be a contractor. He stated he explained contractors could market themselves and work for others. Like Mr MacDonald, he explained he expected the contractors would be a group that PML could market franchises to

[11] In his written evidence, Mr McRandle said that some weeks later he was given a brief document by Mr MacDonald and asked to sign it on the spot which he says he did. He also said that at the time he had noted Mr Macdonald had backdated the document to 27 October 2016, being the date he had started. In the Authority's investigation he states he was interviewed by the then Sales Manager, Grant Bennett, and another PML person. He states that initially there was no written contract or agreement of any sort.

[12] Mr McRandle's oral testimony in that regard did not support his written evidence. In answer to questions from the Authority, he advised he wasn't certain when he received a copy

of the agreement, however, confirmed that it was he who put the dates of 27 October 2016 on the documents, not Mr MacDonald as he had claimed in his written brief of evidence.

[13] The agreement signed by the parties purportedly on 27 October 2016 is identified as “Agreement for Services”. It provides that the company “uses the service of independent estimators” to perform such work [as agreed from time to time] and that PML has agreed to engage the estimator as an independent estimator (2.1 of the agreement)].

[14] Under a heading “payment” in clause 5, the agreement provides that “The company will pay the estimator for carrying out the services on a commission only basis of gross 15 per cent of the value of the job plus GST (the charges) allowing for unders and overs, unders will be carried by the estimator. Overs will be paid on a 50-50 split.”

[15] Clause 7 of the agreement deals with the status of the estimator, specifically providing in 7.1:

The estimator acknowledges by its acceptance of this agreement that it is an independent estimator and will be responsible for his or her own liability for tax, accident compensation, public liability, and any other liability premiums.

[16] It is clear, therefore, that the agreement Mr McRandle signed ostensibly on 27 October 2016, signalled his status was that of an independent contractor and not an employee.

How the relationship operated in practice

[17] Mr McRandle appears to have acted throughout the engagement as an independent contractor. This is indicated by the following:

- (a) Mr McRandle stated that he had worked as a sole trader before and had set up a number of companies. To that degree he was a sophisticated business person and was well aware of the differences between an independent contractor and an employee.
- (b) Mr McRandle submitted GST invoices for payment.
- (c) Mr McRandle provided his own vehicle, some safety equipment and a ladder. He had an accountant and made various deductions against his income tax by way of depreciation and expenses. Alterations to his house were also claimed on the basis he had a home office. He deducted computer expenses in respect of

his laptop and personal protection equipment. When it was put to him in cross-examination that PML had not provided him with any personal protection equipment, he advised he had simply perhaps bent the rules.

- (d) More telling, is the evidence from Ms Blair, who stated that after Mr McRandle believed his relationship with PML had ended, they felt there was nothing they could do but sought legal advice and for the first time were told there was an argument that Mr McRandle was an employee. It is difficult to reconcile Mr McRandle's belief in that regard with his subsequent behaviour. He says he believed the relationship had terminated by February 2020, yet in March 2020 he applied for a wage subsidy as a sole trader. Such an action is incompatible with the belief that he was an employee. When this was put to Mr McRandle, he advised again simply that perhaps he should not have done it.
- (e) Mr McRandle confirmed he didn't ask permission before taking leave. Although he said he always let the company know when he was taking leave, he didn't believe he needed permission to do so. In answer to one question, Mr McRandle said that if the company had said no at any time, he would have taken it anyway.

[18] Mr MacDonald's evidence was that he told Mr McRandle the position was commission based and that he had prepared the agreement. In answer to questions, he advised he used the independent contractor model, because it meant they could bring people into the franchise system this way. He stated he had tried other methods but after a lot of to-ing and fro-ing he had resolved this was the best model to use to build his business towards franchising.

[19] Vaneta Shandil also gave evidence of her belief that the arrangement was that of a principal and independent contractor. She confirmed that invoices were submitted by Mr McRandle. She also advised she did not keep records of sick leave. She stated this was because as Mr McRandle was not an employee there was no requirement. He could simply come and go as he pleased. She advised that he had never submitted a medical certificate for time off and neither would she have expected him to do so.

[20] She also advised that Mr McRandle had cost them money and that the company had been considering its options, i.e. as to whether or not it would take recovery action in respect of its perceived loss. She confirmed that as at the date of the investigative meeting, no action had been commenced. She confirmed that Mr McRandle had asked for a copy of the agreement.

She stated she explained she did not have it at hand but when she found it she sent it to him. She advised that in her discussion with Mr McRandle she made it clear to him that she knew it existed.

Analysis

[21] As was noted by the Employment Court in *Leota* an inquiry is necessary to determine the real nature of the relationship. Whether or not Mr McRandle is an employee or not is an intensely fact-specific inquiry.

[22] Mr McRandle's position can be distinguished from that of Mr Leota. His CV (page 5 of the BOE) was impressive. He described himself as a self-employed plumber gasfitter with 13 years' experience—

recruiting and managing up to six tradesmen focussing on domestic plumbing, roofing, gasfitting and drainage, with some commercial and industrial clients. I had a solid reputation as a competent and skilled plumber and manager.

[23] Mr McRandle also described his employment history as an owner and director of his own company for some 13 years. In describing his skills he also included “competent use of Xero accounting package and some familiarity with MYOB”.

[24] Unlike the situation with Mr Leota, Mr McRandle had a real understanding of the differences between an employment relationship and that of an independent contractor. He had that understanding when he entered into the arrangement with PML.

[25] The evidence I heard indicated there was not a high level of control over Mr McRandle's work. Further, he had the flexibility to change his work days and to take time off without consultation. When he did take leave, he was not required to arrange a replacement, although it seems he did. However, this person was not required to be approved in advance.

[26] Again, unlike the situation in *Leota* and considering the fundamental or economic reality, Mr McRandle had an, albeit it limited, ability to cultivate new and existing customers if he wished.

[27] Mr McRandle's admissions regarding his treatment of income and deductions from a tax perspective also showed that he acted as, and treated his business as, an independent entity with its own ability to make deductions and to take on work. It does Mr McRandle no credit when he said in explaining the fact he applied for the wage subsidy during COVID as a sole

trader, deducted house expenses, personal protection equipment and other plant which were made on the basis of him being a sole trader, as simply him bending the rules.

[28] Mr McRandle's position is closer in comparison to that of Mr Cunningham in *TNT Worldwide Express (NZ) Ltd v Cunningham* in the way he claimed depreciation and other expenses.² Again in contrast to Mr Leota, Mr McRandle had a GST number, claimed GST and claimed a number of other expenses for tax purposes.

[29] Considering the indicia set out by the Employment Court in *Leota*, it is noted that Mr McRandle:

- (a) Supplied and maintained his own tools of trade;
- (b) Was paid according to task completion and was not paid on the basis of time worked;
- (c) To an extent bore the risk of loss or at least the chance of not making a profit from a job;
- (d) On the evidence was free to work for others; and
- (e) Was described in the written agreement as an independent estimator with it being very clear this was tantamount to being an independent contractor.
 - (i) Conversely, PML did not exercise detailed control over the way work was performed.
 - (ii) Tax was not deducted from his pay.
 - (iii) Mr McRandle did not receive paid holidays or sick leave.

[30] The overall impression, therefore, is that the relationship between the parties started as that of principal and independent contractor. This was in accordance with the signed agreement between them. This relationship did not change during the course of the relationship. Mr McRandle's evidence and that of his partner, Ms Blair, strongly suggests that Mr McRandle was concerned about the potential of a claim being brought against him by PML for losses and after advice has decided to challenge his status claiming he was in an employment relationship. However, Mr McRandle was a sophisticated business person who had enjoyed the benefits of an independent contractor relationship but for his own reasons now wishes to argue he was an

² [1993] 3 NZLR 681 (CA)

employee. However, as Lord Denning MR put it, “Having made his bed as being self-employed, he must lie on it”.³

[31] It follows therefore that the Authority has no jurisdiction to deal with any claim Mr McRandle may have over the termination over that independent contract. If he has indeed suffered loss and/or general damages, then he will need to pursue these in a different forum.

Costs

[32] Costs are reserved.

Geoff O’Sullivan
Member of the Employment Relations Authority

³ *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 at 581.