

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2019] NZERA 626  
3024414

BETWEEN                      CASSANDRA REID  
   Applicant  
  
AND                                NGĀTI RANGI TRUST  
   Respondent

Member of Authority:        Michele Ryan  
  
Representatives:              Allan Halse, advocate, for the Applicant  
   Guido Ballara, counsel the Respondent  
  
Investigation Meeting:        21 May 2019  
  
Submissions Received:        Oral submissions on behalf of the Applicant  
   Written submissions on behalf of the Respondent  
  
Date of Determination:        1 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Cassandra Reid has lodged several personal grievance claims with the Authority. Before those matters may be progressed, there is a preliminary matter concerning whether Ms Reid was employed by Ngāti Rangi Trust (“the Trust” or “the respondent”) or whether she was provided services to the Trust as an independent contractor. This determination decides that matter only.

**Background**

[2] Ms Reid is of Ngāti Rangi descent. Prior to 2015 she had been a trustee for the respondent. From time to time she attended associated committee meetings and for these she was paid an honoraria.

[3] In February 2015 Ms Reid was appointed by the Trust to negotiate, on its behalf, with the Office of Treaty Settlements (OTS) with a view to settling Ngāti Rangī claims. In September 2017 a disagreement arose between her and the Trust. At this point Ms Reid advised the Trust she regarded herself as an employee. Formal negotiations with OTS concluded in late 2017 and Ms Reid's work for the Trust came to an end.

[4] Ms Reid says she is certain she was in an employment relationship with the Trust while she undertook Treaty negotiations for it. She says if the Trust had intended for her to engage with it as an independent contractor it would have given her its standard 'Supply of Services' agreement as it did with other individuals who were independent contractors. Next, she says the Trust deducted PAYE from her wages which indicates she must have been an employee.

[5] The Trust says the services Ms Reid provided were as an independent contractor.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has expressed conclusions and made findings on those matters necessary to dispose of the matter.

### **The Law**

[7] The onus on establishing whether Ms Reid was an employer rests on her to establish on the balance of probabilities.

[8] The Act defines the meaning of Employee at s 6(2) as follows:

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.

[9] In *Bryson v Three Foot Six Limited*<sup>1</sup> the Supreme Court provided further guidance when assessing the real nature of the relationship.<sup>2</sup> The judgement reinforced the requirement at s 6(3) of the Act that the Court or the Authority "must consider all relevant matters", including any written and oral terms between the parties which may indicate a common intention as to the status of the relationship, and any divergences from those terms.

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<sup>1</sup> [2005] ERNZ 372  
<sup>2</sup> Above at [32]

[10] “All relevant matters” requires an inquiry into how the relationship operated in practice, and must take into account who controlled how the work was done (the control test), whether the work was integrated into the business (the integration test), and whether the person contracted had, in effect, been working on his or her own account (the fundamental test). There is no evidence of industry practice in the case given the relative uniqueness of Ms Reid’s role. However Ms Reid’s taxation status and arrangement also require consideration. In *Poulter v Antipodean Growers Limited* the Court concluded that s 6 requires the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>3</sup>

### **What were the parties’ intentions?**

[11] Section 6(3) of the Act makes it clear that no matter how the parties describe their relationship, that characterisation alone does not determine the status of the relationship. Nevertheless, a written agreement between the parties may be a persuasive factor in determining if there was a common intention between them regarding the nature of relationship.

[12] Before Ms Reid filed her claim with the Authority, she had advised the Trust that she considered there had been a signed employment agreement between them, but that she did not have a copy of it. In contrast the Trust says an administrator was instructed to make arrangements to provide Ms Reid with a contract for services, but says it has been unable to locate the document.

[13] At the Authority’s investigation neither party strongly contended the existence of a formal (albeit missing) document governing their relationship and the evidence on this matter does not advance either party’s position. However, there is no dispute that in February 2015 the Trust provided a letter to Ms Reid which acknowledged her agreement to be part of the negotiations team, and recorded how she would be remunerated for the work. The letter is the only document which reflects agreed terms between them. No reference is made within that correspondence to indicate the parties’ intentions as to the nature of the relationship.

[14] Ms Reid says when the parties discussed her appointment she was not advised she would be an independent contractor, nor does the February 2015 letter affirm that position. She is correct in that view. However, I am not prepared to conclude that Ms Reid must have

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<sup>3</sup> [2010] NZEmpC 77 at [21].

been an employee on the basis that she was not given a contract for services. Taking a counterfactual approach, I am equally unwilling to conclude Ms Reid must have been an independent contractor on the basis she does not have an employment agreement.

[15] I accept that it was the Trust's intention to have Ms Reid provide services as an independent contractor, but it was not able to produce any documentation to demonstrate its intention was shared by Ms Reid. It is therefore necessary to look at how the relationship operated in practice to determine its real nature.

### **How the Relationship Operated in Practice**

[16] Ms Reid did not particularise the content of work in her brief of evidence. I understood from her oral testimony that her work involved communication and consultation with the iwi and other interested third parties, as well as preparation for, and attendance at, various hui for the purpose of negotiating settlement of Ngāti Rangī claims.

### ***Control***

[17] The control test involves an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it.

[18] Ms Reid was candid in her responses to questions during the Authority's investigation. Ms Reid says the negotiators worked collaboratively via conference calls or scheduled hui but agrees those discussions did not amount to instructions by the Trust as to how to perform her role. She accepts she was not supervised when undertaking her work, rather, she was simply expected to perform in a way that would achieve settlement of the claims.

[19] Ms Reid generally conducted preparatory work from home when not attending hui. There were no set days or hours of work and I find she was able to work as it suited her. She was not required to attend every meeting planned with the Crown or iwi but was welcome to do so. There is some evidence that she was expected to attend hui when her particular area of speciality was under discussion. It is inevitable that a principal will have some minimum requirements a contractor must meet, and I am unwilling to conclude that factor alone demonstrates an employment relationship.

[20] There is evidence that Ms Reid could, and did, make herself unavailable to perform work for the trust from time, and she was able to take leave at her own initiative and according to her particular needs. I accept Ms Reid provided prior notice to the Trust when taking leave but there is no evidence that she needed to apply or obtain permission from the Trust to take leave, nor was she was required to provide an explanation for any absences.

[21] There is almost no evidence to suggest the Trust interfered with Ms Reid's work, or exerted any meaningful control over the way in which Ms Reid worked. My findings under this topic of examination sway heavily against a finding that the parties were in an employment relationship.

### ***Integration***

[22] The integration test requires an assessment as to the extent Ms Reid was integrated into, and part and parcel of, the Trust's activities, as opposed to an being accessory to them.

[23] Who supplies the resources necessary to perform a role may indicate the level of integration in a business.

[24] Ms Reid also agrees that she provided her own equipment to perform the role although there is some evidence that she could access work related equipment owned by the Trust if she chose to. It is noted also that Ms Reid had her own email address, computer, and phone number through which she conducted the work and that there were no business cards or uniforms.

[25] Ms Reid accepts her work for the Trust was aimed towards a very specific purpose. I pause to note Ms Reid contended that a feature of the work performed as an independent contractor is that the engagement must have a specific end date. I am unaware of any legal requirement which imposes that condition, and do not accept Ms Reid is correct in law on this point.

[26] In any event, Ms Reid was always aware that her work for the Trust as a negotiator would finish when settlement with the Crown was reached. She conceded the work she undertook was not regarded a part and parcel of its day to day business. I am not persuaded Ms Reid role was integrated with the Trust's operations. This leads me to conclude it less likely that the parties were in an employment relationship than that of a principal and independent contractor.

*The Fundamental test*

[27] This test, also known as the “economic reality test” explores the extent to which Ms Reid took on financial risk in providing her services including whether she was in business for herself.

[28] Ms Reid did not receive remuneration through an hourly wage or an annual salary. Rather the quantum of payment for work was in accordance with the agreement set out in the letter of February 2015 which provided for a daily rate or half daily rate. Payment for work was linked to attendances at hui or meetings and preparation of those activities was built into the rate. If a scheduled meeting or activity was cancelled or postponed Ms Reid could not claim for payment.

[29] At the end of each month negotiators would individually record on a template “Ngāti Rangī Negotiation Team and Subcommittee, Meetings and Claim Form” the number of hui attended and when, the total “fee” of these, and any related expenses.

[30] I understand from the evidence that payment for work was wholly dependent on Ms Reid providing the relevant claim form to the Trust. Ms Reid agreed under questioning that this was not the usual means by which an employee would receive wages. I find the method by which Ms Reid submitted and received payment from the Trust aligned exactly with the means by which individuals engaged on a contract for services with the Trust sought and received payment for work undertaken.

[31] It is further notable that regular payslips did not record payments made by Trust to Ms Reid as “Wages” but rather as “Taxable Allowances”. Ms Reid advised she had been both self-employed and had worked as an employee. I am confident she was cognisant of the differences between the two. Ms Reid conceded she was not paid during periods of absence whilst involved with the negotiations for the Trust, and nor did she have an expectation that she would receive payment for annual leave, sick leave or bereavement leave.

[32] The ability for Ms Reid to enhance her remuneration for work performed for the Trust may have been relatively confined given the nature of her activities. But she was able to affect, at least to some degree, the level of remuneration she could receive from it by increasing or limiting her attendance at hui and meetings according to her circumstances. Her ability to exercise choice over these matters indicates she accepted an element of

financial risk in performing the work. This conclusion tends to lean towards a finding that Ms Reid was an independent contractor, although I do not consider it determinative.

[33] I need to note there is no evidence that Ms Reid was in business on her own account in the usual way, for example there is no evidence she was GST registered. That she did not exercise that opportunity does not mean she was precluded from doing so and it is not in dispute that Ms Reid undertook similar work for another entity over the timeframe she was involved in Treaty negotiations, albeit she says this was unpaid.

### *Taxation*

[34] Taxation arrangements may also be a factor indicating the real nature of the relationship but caution must be applied where the taxation status may simply be a consequence of how the parties labelled the relationship. A party's tax status is not determinative of employment status.<sup>4</sup>

[35] A significant point of contention between the parties lies with the content of Ms Reid's payslips.

[36] Ms Reid provided two payslips to illustrate her taxation status for the period over which she worked as a negotiator. Both payslips record PAYE deductions. Ms Reid says payment of PAYE is a taxation category applied solely to employees. In contrast, the Trust points to the same payslips; each refer to Ms Reid's tax code as WT – short hand for Withholding Tax - the tax code assigned by IRD to independent contractors.<sup>5</sup>

[37] I accept that the payslips Ms Reid received were unclear where both acronyms for separate tax codes are recorded.

[38] I am satisfied the Trust's explanation resolves the matter as follows: the Trust uses Payroll software to record and manage wage and salary payments for its employees as well as invoice payments to independent contractors it engages. The narrow space assigned to record various deductions reduces the descriptor of the deduction to "PAYE" as opposed to "PAYE/Withholding tax". The Trust produced an IR348 report which it furnished to IRD

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<sup>4</sup> *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 at [46]

<sup>5</sup> The Trust provided a copy of IRD form IR330C which informs contractors receiving scheduler payments that the appropriate tax code is WT.

which reflects Ms Reid's tax code as WT. I am not persuaded Ms Reid has established she was in an employment relationship based on a deduction descriptor contained in payslips.

### **Conclusion**

[39] Having applied the legal tests to analyse how the relationship operated in practice, and standing back and assessing the true nature of the relationship over the course of the parties' engagement as a whole, Ms Reid was an independent contractor. It follows that the Authority has no jurisdiction to determine Ms Reid's claims where these require her to have been employed by the Trust. Ms Reid's application is dismissed.

[40] Costs are reserved.

Note: This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.<sup>6</sup>

Michele Ryan  
Member of the Employment Relations Authority

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<sup>6</sup> Employment Relations Act 2000, s 174C(4)