IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 765
3172324

	BETWEEN	MOSHE SHELEG (AKA MOSES SHELEG) Applicant
	AND	HEALTHALLIANCE N.Z. LIMITED Respondent
Member of Authority:	Sarah Blick	
Representatives:	Applicant in person Richard Upton, counsel for the respondent	
Investigation Meeting:	22 August 2024 in Auckland and by audio visual link	
Information and submissions received:	27 August and 30 September 2024 from the applicant 26 September 2024 from the respondent	
Determination:	20 December 2024	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] HealthAlliance N.Z. Limited (HA) was the provider of business support services to the four district health boards in the Northern Region of New Zealand. It is now part of the data and digital team at Te Whatu Ora - Health New Zealand (TWO). HA provide data and digital support and project delivery services to the four districts that now make up TWO's Northern Region. In 2020, HA commenced the delivery of a major project, with the aim of migrating the regional finance system onto a new national finance system.

[2] Mr Sheleg is a very experienced IT developer who was brought on board to work on the project as a contractor through a specialist IT recruitment agency (the agency). Mr Sheleg says the project turned out to be the "project from hell" given the pressure and difficulties

involved with it. He says the working environment was "toxic" and is now asking for financial compensation on the basis he was, in reality, an employee and not a contractor. He claims he was bullied, harassed, demonised, insulted, paralysed, discriminated and physically and mentally harmed, while working on the project for nearly a year. He says he lost income due to unreasonable discrimination on the basis he was not vaccinated after he was informed his contract would end, which it did in 2022.

[3] HA says the Authority does not have jurisdiction to determine Mr Sheleg's claims because there was never an employment relationship between them. It says the real nature of the relationship between them was a contract for services. HA acknowledges the working environment during the project was pressurised, but denies Mr Sheleg was bullied and says he was provided with a safe working environment.

[4] This determination deals with only the preliminary issue of whether Mr Sheleg was an employee during his time with HA. It does not address Mr Sheleg's substantive claims or if there are time limitations with them.

The Authority's process

[5] Mr Sheleg and HA's Talent Acquisition Manager Peter Lowndes provided witness statements to the Authority, along with documents relevant to the issue of Mr Sheleg's work status. The witnesses gave sworn or affirmed evidence – Mr Sheleg in person at the investigation meeting, and Mr Lowndes by audio visual link with leave from the Authority. Both parties were given the opportunity to question each other's witnesses, and later provided written closing submissions.

[6] 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 and considered.

The issue

[7] This determination addresses as a preliminary issue whether or not Mr Sheleg was an employee while carrying out his work at HA.

Background

Mr Sheleg's background

[8] Mr Sheleg has held numerous roles as a Java developer in New Zealand since around 2006. His CV says he has both been employed and engaged as a contractor in different organisations. Since September 2009, apart from one period of employment lasting around 18 months ending in 2014, his CV says he was engaged on "contracts".

[9] Mr Sheleg's worked as a contractor for HA between August 2017 to April 2018, which he confirmed in evidence. After he finished that period of work, Mr Sheleg worked as a contractor for another organisation. He has done a period of work as a contractor since his time at HA ended, but at the time of the investigation meeting, reported being unemployed.

[10] Mr Sheleg is a 99% shareholder of a registered company, Application Group Limited (AGL). AGL was incorporated in February 2007, at which point Mr Sheleg became a co-director and shareholder with another person. In January and June 2008, he became AGL's sole director and shareholder, respectively. He remains its sole director, but his partner has been a minor shareholder in it for several years.

HA's contract with the agency

[11] HA and the agency were parties to a document called a Master Procurement Agreement for Recruitment Services for Contractors Services Agreement (MPA). The MPA provided is signed by HA dated 19 June 2015 for a term of 12 months. It appears the MPA was renewed and was operative at the time of Mr Sheleg's hiring. The MPA identified the agency as a service provider and obliged it to supply recruitment services to HA. The MPA stated the agency would act as the contracting party with contractors "such that the contractor relationship is between the service provider and the Contractor". The agency was required to pay "Contractor Fees" and "make such tax or other deduction as required by law". It stated at all times a contractor is contracted to the service provider under a separate agreement and has no direct contractual or employment relationship with HA.

The FPIM project

[12] In 2020, HA commenced planning for the delivery of a major project, named the Finance, Procurement and Information System, Regional implementation Project (FPIM project). As noted, the aim of the FPIM project was to migrate the regional finance system

onto the new national FPIM finance system. HA says it was predicted the FPIM project would commence in late 2020 and would be completed early in 2021.

[13] HA says it did not have the volume of staff or staff with all of the technological experience to deliver all aspects of the FPIM project. It determined that it would require additional staff members to complete the FPIM project. In order to obtain staffing for the FPIM project, HA engaged the agency, through which Mr Sheleg and other staff were hired.

[14] In August 2020 HA sought to have the agency provide it with a candidate to fill the role of "Contractor; Software Consultant (JCAPS developer)". The agency provided HA with Mr Sheleg's CV and his candidate rate along with its full charge rate including the candidate charge rate (showing it received a margin of $130 per day for his appointment).

[15] Details of the contractual documentation entered into between Mr Sheleg and the agency are outlined below, along with details about how the parties' relationship worked in practice.

[16] In total, Mr Sheleg worked on the FPIM project and worked on other projects and tasks between August 2020 and around May 2022.

[17] In mid 2022 Mr Sheleg notified HA of complaints he had regarding how he had been treated in its workplace. HA appointed an external investigator to investigate Mr Sheleg's complaints. Mr Sheleg participated in the investigation, which culminated in a written report dated 18 November 2022. The investigator concluded in the report that Mr Sheleg's claims were not made out and that HA had not behaved improperly in relation to the management and operation of the FPIM project.

The law

[18] The Authority's task is to determine the real nature of the relationship here. Section 6 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.

[19] A broad approach is required to assess employment status including consideration of any verbal and written agreement, control, integration in the business, who benefits from the work and whether the person claiming employment status was really in business on their own account. This is reflected in the Supreme Court's judgment in *Bryson v Three Foot Six Ltd*, which stated:[1]

> "All relevant matters" certainly includes 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 possible to examine the relationship in light of the control, integration and fundamental tests.

[20] The outcome of the Authority's inquiry will determine whether Mr Sheleg's claims are employment relationship problems amenable to being resolved by the Authority.

Intention of the parties

[21] There was no written contract between Mr Sheleg and HA, which it says is not consistent with how it structured employment relationships. Mr Lowndes gave evidence about this stating most of the staff at HA were employees and were employed directly pursuant to written employment agreements.

[22] It is common ground that on 26 August 2020 Mr Sheleg and the agency signed document called a "Contractor Service Agreement" (CSA). It included a start date of 31 August 2000 with an end date of 26 February 2021. The CSA stated "in order to achieve a joint understanding of expectations" it set out a number the following "assignment details":

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[1] *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32]. Guidance in *Bryson* was recently re-affirmed in *Rasier Operations BV v E Tū Inc* [2024] NZCA 403.

(a) Mr Sheleg was named as the "contractor" with AGL named as his "trading entity";

(b) The client was HA;

(c) His role was JCAPS Developer;

(d) He was to work 5 days a week;

(e) His rate was $720 per day plus GST if applicable; and

(f) The assignment could be terminated by either party on 10 working days' notice.

[23] The CSA is then signed on the same page saying the "assignment agreement" is agreed accepted by both parties. It was signed by Mr Sheleg "for and on behalf of the Contractor".

[24] Terms and conditions are recorded in subsequent pages. Under the heading "INDEPENDENT CONTRACTOR" it stated the relationship was not a partnership, agency, employment or joint venture relationship. It stated Mr Sheleg's status was that of an independent contractor in business on his own account. It stated, "accordingly":

> 1.1 Taxes
>
> You will be responsible for the payment of all taxes and other payments applicable under existing laws including, but not limited to, GST, income taxes and Accident Compensation contributions and indemnifies [labour hire company] from these liabilities. You undertake that you have a valid GST registration, if applicable.
>
> 1.2 No Allowances
>
> You will not be entitled to any payments or benefits relative to sickness, superannuation, holidays, redundancy and the working of overtime or penal hours unless specifically authorised by the Client.
>
> 1.3 Fines
>
> You are responsible for the payment of any fine or penalty for failure to comply with any statute regulation.
>
> 1.4 Indemnity Insurance
>
> All independent contractors are required to be covered by professional indemnity insurance. [Agency] has its own cover…which provides cover ….for claims arising out of the actions of its Contractors…[Agency professional indemnity insurance does not provide cover in the situation where legal action is taken against you (or your company). You must obtain your own professional indemnity insurance.

[25] The terms further stated:

(a) The contractor agreed to supply exclusively the services of the CSA and have no ability to subcontract or reassign the contract to another entity or individual;
(b) The contractor was required to complete and submit a timesheet for HA's approval at the end of each week and the end of the month;
(c) The agency processes invoices on a monthly basis and take all information on hours/days worked from approved timesheets;
(d) Payment for services and authorised expenses will be made following the month worked;
(e) If the contractor is GST registered, the agency would provide the contractor with a Buyer Created tax invoice available from with the agency timesheet portal;
(f) The contractor could not, for a period of six months from the end of the assignment accept employment with or enter into a contract for the provision of services directly or indirectly with HA;
(g) The contractor shall work exclusively for HA and shall not take any other employment whether temporary or part-time unless otherwise agreed and authorised in writing by both HA and the agency.

[26] The written terms indicate HA engaged Mr Sheleg via the agency who, in turn, engaged AGL who engaged Mr Sheleg. There is no evidence that Mr Sheleg did not understand the contractual documents that he signed.

[27] HA signed an "Agency Supplier confirmation" on the same date confirming the agency's daily charge rate of $830.

[28] In February 2021 HA internally sought and gained approval to extend Mr Sheleg's term as a contractor. Another agency supplier confirmation was signed extending the assignment from March 2021 until 1 June 2021.

[29] HA internal documents show HA internally sought and gained approval to extend Mr Sheleg's term as a contractor to 1 June 2022.

[30] Some restrictions were clearly placed on Mr Sheleg under the CSA, including the requirement for him to work exclusively for HA and not take on other work except by written agreement, as well as being subject to restraints around intellectual property and confidentiality.

[31] There is evidence that when the contract was in place Mr Sheleg saw himself as a contractor. An email dated 8 November 2021 shows that well into his period of work he still saw himself as a contractor, which had him stating "I am an IT contractor for Health Alliance…". Mr Sheleg acknowledges it was only after receiving legal advice after he finished working for HA did he realise the true nature of the relationship between the parties was employment.

[32] The terms and conditions of the CSA contained terms consistent with an independent contractor engagement but also some more restrictive terms consistent with an employment relationship. The parties' common intention and understanding at the relevant times however was that theirs was not a relationship of employer and employee. Having that mutual intention is however not determinative. I turn now to considering how the relationship worked in practice.

Control

[33] The focus of the control test is now generally accepted as focused on whether or not control is exerted and able to be exerted on a worker, not why it is exerted.[2] Generally, a worker with a greater degree of flexibility is more likely to be a contractor, whereas a relationship with a higher degree of control is more likely to be an employment relationship.

[34] HA submits the evidence shows Mr Sheleg was treated and managed as a full-time contractor, which included him being managed via the agency. It provides an example of it referring the management of Mr Sheleg's reaction to a mandatory vaccination requirement under the COVID-19 vaccinations order to the agency, shown in an email from November 2021.

[35] Mr Sheleg says HA controlled all aspects of his work. He says HA had control over the work he did as well as deadlines, and that he was subject to "micromanagement". He recalls, by way of illustrative example, taking part in a four-hour meeting working over his laptop while others stood over him. Another example given was his team being instructed to use a certain version of software when he believed another version was more stable.

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[2] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [82]-[84], *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [48]-[49], as noted in *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192 at [58].

[36] Mr Sheleg gave evidence that he was responsible for most of the technical components relating to the FPIM project. He says he was at the centre "tying the strings" together and if he was missing the project could not function. He says he was the only person with access to the production server and had to be online when others working on the project overseas needed access to it. This meant he had to work outside of office hours and in weekends when required.

[37] Terms of the CSA required Mr Sheleg to work five days a week and exclusively for HA. Mr Sheleg points to another clause in the CSA referring to a lack of punctuality after a warning has been given would lead to termination of his assignment. He says this further tied him up to a work schedule. I accept Mr Sheleg did work five days a week and beyond, including in weekends when necessary. He acknowledged there was a small amount of flexibility in relation to him being able to take a weekday off if he had worked on the previous weekend.

[38] He said taking a day off whenever he wanted was not a reality however, as people including patients would be impacted if he did. There is no evidence of Mr Sheleg requesting time off and it not being granted, or that there was or would be a consequence if he did so. I do accept that the ability to take days off was limited given the dynamic and pressured nature of the project.

[39] That Mr Sheleg worked full time for HA is more consistent with an employment relationship. This reality, as well as the CSA, prevented him from working for third parties. HA submits this reality is not relevant, rather it reflects that this situation involved a full-time engagement. It does not necessarily reflect an employment relationship exists – it may simply illustrate a full-time contract for service exists. The Authority does not accept that submission based on the realities of the situation.

[40] HA clearly exerted significant direction and control during Mr Sheleg's relationship with it, and almost all matters relevant to control are consistent with a full-time employment relationship existing. Other relevant factors must now be considered.

Integration

[41] The traditional integration test involves an examination of the extent to which a worker is integral to and integrated with an organisation.

[42] HA accepts that Mr Sheleg was integrated into its workplace. However, it says the work Mr Sheleg performed was based on a particular, specific project. This was work that contractors were engaged to complete. Mr Lowndes stated in his witness statement:

> HealthAlliance had an important IT roll out that we were needing to secure staff members for. We had a shortfall of people who could develop particular parts of that software and this is detailed in the document. This also reflects that, at the end of that project, the need for those staff members would end. Again, in my experience, this is consistent with a situation where HealthAlliance would opt to use independent contractors so as to secure people quickly, without fuss and with flexibility.

[43] HA says the project work that Mr Sheleg completed was not continuous, as would be the case in an employment relationship. Instead, it was for a specific project – which was then extended. Mr Sheleg has given evidence, however, that the FPIM project was not the only work he undertook during his time with HA. He carried out both "BAU" tasks and work on other projects. I accept Mr Sheleg's evidence about this, as HA's first internal requisition records show HA initially had a shortfall in people who could develop in JCAPS and that skill was required in "urgent projects", including "remaining migration work". The final internal requisition records state "it is essential that we retain Moses" and names numerous projects against which the proposed rate would be recoverable.

[44] Mr Sheleg says all hardware and software he required was owned and provided to him by HA or HA suppliers. Although ordinarily a contractor works with their own equipment, I do not consider this factor of particular significance in the IT industry. The nature of IT work in organisations such as HA involves an individual working with and undertaking work on an organisation's systems and would require compatible hardware and software to be provided.

[45] Mr Sheleg points to receiving health and safety documentation, apparently upon commencing with HA. A "Pre-employment health and safety screen" form has been provided to demonstrate he was treated as an employee in relation to health and safety matters. The form is blank and does not assist the Authority. In any event, as a person conducting a business or undertaking or PCBU, HA had a duty of care to Mr Sheleg whether he was an employee or contractor.

[46] Mr Sheleg worked at the same workplace as HA employees and formed part of a team working on the FPIM project and other tasks. He says he was invited to all team/company meetings with the exception of paid personal development meetings. He appears to have

worked from home as a result of COVID-19 restrictions and attended meetings remotely, but this was not uncommon during this period, particularly in the Auckland region.

[47] Mr Sheleg had his own AGL email address, which he used to email the Ministry of Health in November 2021 saying he was an IT contractor working for HA, and was querying if he was exempt from a health order requiring vaccination. It is not disputed that Mr Sheleg, however, was provided with an HA email address and email signature in his day to day work which did not differentiate him as a contractor to staff or third parties.

[48] On balance, the Authority finds Mr Sheleg was very well-integrated and his work was clearly integral to HA's business. The level of integration was highly consistent with a full-time employment relationship existing.

Fundamental test or economic reality

[49] This test considers whether Mr Sheleg could reasonably be in business on his own account or performing services on his own account and thus assumed an element of risk in his engagement with HA including profit and loss from any joint venture.

[50] Taxation arrangements are a relevant consideration although care is to be taken to consider whether these may be a consequence of the labelling of a person as an independent contractor.[3]

[51] During the work period HA says Mr Sheleg issued tax invoices to the agency for payment based off timesheets. The agency then paid those invoices, and HA then paid the agency. Mr Sheleg gave evidence that it was not him who prepared invoices - rather the agency generated Buyer created tax invoices.

[52] It is common ground that HA did not pay Mr Sheleg directly. It appears the agency calculated the value of work completed based off the timesheets, included its margin and rendered an invoice to HA for the total, plus GST for the services that it had provided. The agency invoiced HA on a monthly basis. HA then paid the agency, which then deducted withholding tax before paying AGL.

[53] A contractor having their own insurance is more consistent with them being in business on their own account. Mr Sheleg confirmed at the investigation meeting that he had

[3] *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 at [17].

professional indemnity insurance, this was a requirement of the CSA with the agency. Mr Sheleg says he did not insure products and/or systems designed or built because many other people were part of a project's delivery.

[54] Mr Sheleg was GST registered. He acknowledges GST was paid by AGL. He also acknowledged he or AGL paid relevant ACC levies.

[55] Mr Sheleg agreed to a full-time "assignment", via the agency, initially for a fixed term which was then renewed a number of times. Each occasion the relationship was renewed, Mr Sheleg agreed to work fulltime hours. Working for one entity at the same is more consistent with an employment relationship, and it restricted Mr Sheleg's ability to profit from his work, as no one else was allowed to perform the work he was doing for HA. HA says however on each occasion the assignment was renewed Mr Sheleg could have chosen to walk away and to work elsewhere.

[56] Mr Sheleg gave evidence that as a contractor you are treated like "garbage" and many are migrants being exploited and being dictated to in relation to their work including how much you are paid. There is insufficient information before the Authority to make any comment on that claim, and the focus must be on Mr Sheleg's situation.

[57] Mr Sheleg says he had no say in terms of his pay and that it was basically dictated to him. Mr Sheleg was paid a daily rate. HA says while this was fixed for the project, it was open to him to renegotiate that rate upon the next engagement. HA's internal requisition records show in the "Role Details" that "Salary Details" were identified. These record a "minimum salary" and "maximum salary" based on a daily amount for the role. A number of these records have been provided to the Authority. The first "maximum salary" identified was a daily rate of "850", which in later requisition records settled on "830". $830 was the agency's charge out rate for Mr Sheleg throughout his period of work. That HA set its own maximum rate, which settled on the agency's consistent charge out rate, indicates there was little scope for Mr Sheleg to negotiate the pay he received to maximise his gains.

[58] Having considered these factors, the Authority finds on balance that Mr Sheleg was not in business on his own account while carrying out work for HA between August 2020 to May/June 2022. Although Mr Sheleg has a history of contracting for organisations in New Zealand, the fundamental and economic reality of his work with HA at the relevant time has been the Authority's focus. Mr Sheleg had no ability to manage his work to increase or

maximise his gains, pursue his own business or develop goodwill in the operation of his business.

Outcome

[59] Mr Sheleg has given a significant amount of evidence as to what he calls the "operational reality" of the situation, which HA's witness has largely been unable to address in his evidence. Section 6 of the Act requires the Authority to determine the true nature of the relationship. Taking account the totality of the relationship and how it operated, I conclude Mr Sheleg was an employee for the purposes of the Act as set out in s 6.

Next steps and costs

[60] An Authority officer will be in touch with the parties to arrange a case management conference to discuss the next steps in this matter.

[61] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority