

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 645
3279279

BETWEEN	JAN ZAWADZKI Applicant
AND	HYDROXSYS (NZ) LIMITED Respondent

Member of Authority:	Matthew Piper
Representatives:	Kate Tennent, counsel for the Applicant Joey James and Victoria Levey, counsel for the Respondent
Investigation Meeting:	25 June 2025 in Auckland
Submissions received:	8 July and 21 July 2025 and from the Applicant 16 July 2025 from the Respondent
Determination:	14 October 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jan Zawadzki's relationship with Hydroxsys (NZ) Limited (Hydroxsys) started on the basis he hoped to receive equity in the company by introducing it to potential customers and investors in the United States. Mr Zawadzki claimed that the relationship later changed to one of employment, but that he was never paid for his work.

[2] Hydroxsys said it had a commercial relationship with Mr Zawadzki and that he was at all times an independent contractor. It therefore disputed the Authority's jurisdiction to investigate Mr Zawadzki's claims.

[3] This determination deals with whether the relationship between the parties evolved so that Mr Zawadzki became employed by Hydroxsys. If Mr Zawadzki was indeed employed by Hydroxsys, he intends to pursue a wage arrears claim.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Zawadzki, Mark Hartstone and Andrew Graham. An in-person investigation meeting was held at which all witnesses answered questions under oath or affirmation from me and the parties' representatives.

[5] Following the investigation meeting, the Authority directed the parties to search for and lodge specified documents by 1 July 2025. Each complied with this direction.

[6] The applicant provided submissions on 8 and 21 July 2025, and the respondent provided submissions on 16 July 2025, which were of assistance to the Authority.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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.

The issues

[8] The sole preliminary issue for investigation and determination is whether Mr Zawadzki was employed by Hydroxsys.

Background

[9] Mr Zawadzki has extensive experience as a senior business leader, including in professional advisory services. He has been involved in founding and growing various companies in Silicon Valley, and provides strategic advice and consulting to business leaders. It is fair to say Mr Zawadzki is a sophisticated businessperson with a strong understanding of how companies grow, are funded and the potential for upside through being an equity holder in a business.

[10] Hydroxsys is a cleantech company which produces a purification membrane intended to improve wastewater in food and other industrial processes.

The start of the relationship

[11] In early November 2019, Mr Zawadzki was introduced to Mr Hartstone, the then CEO of Hydroxsys. When the two met, Hydroxsys was working on field trials of its membrane technology. Mr Hartstone said that at that time the membrane product was proven and Hydroxsys was looking to commercialise it through engagement with potential purchasers. Hydroxsys had been testing the commercial application of the product with a number of local parties and also had aspirations to take the product global. In order to do so it needed international contacts and additional cash.

[12] Mr Zawadzki's background in the United States and his connections to potential sources of investment was attractive to Hydroxsys. Both parties felt they may benefit from working together in an arrangement where Mr Zawadzki would introduce Hydroxsys' product to parties he had connections to in the United States and where he would aim to generate interest from investors to gain the cash injection the company needed.

[13] Accordingly, on 13 November 2019 Hydroxsys and Mr Zawadzki signed a nondisclosure agreement (NDA). The NDA gave the company the comfort needed for Mr Zawadzki to take its product to the United States and introduce it to potential clients and investors.

[14] As it turned out, the NDA was the only agreement the parties ever signed documenting their relationship. Accordingly, its terms are important. Most relevantly the NDA:

- a. Provided protections for Hydroxsys in relation to its intellectual property and Mr Zawadzki's use of its confidential information;
- b. Described its purpose as relating to "discussions and/or negotiations between the Parties" concerning the potential application of Hydroxsys' membrane technology;
- c. Had a term of five years for the use and authorised disclosure of Hydroxsys' information (although Mr Zawadzki's confidentiality obligations were said to be of indefinite duration);

- d. Specified that nothing in the NDA would constitute a relationship of employment or partnership between the parties;
- e. Said that neither party had the right or authority to act on behalf of the other in relation to incurring liability or entering contracts, and that each party was prohibited from doing so; and
- f. Said it was the entire agreement between the parties relating to its subject matter.

[15] Soon after signing the NDA, Mr Zawadzki went to the United States and spoke to a number of potential investors about Hydroxsys' product.

[16] On 27 November 2019 Mr Zawadzki emailed Mr Hartstone with a proposal for how he might be engaged by Hydroxsys. In particular, Mr Zawadzki offered to provide a range of introductions to key contacts in the San Francisco Bay Area, expertise on strategy and fundraising, and an internally facing security audit as part of ensuring risks within the business were appropriately managed. In exchange for these services, Mr Zawadzki sought a right to be issued a particular share of the company over time should certain trigger events occur.

[17] Mr Zawadzki specified in his 27 November 2019 proposal that he was not seeking cash in exchange for his services, but toward the end of the email he noted that if his "role shifts to a more operational one, we will negotiate a separate comp [sic] package commensurate with the role".

[18] Mr Hartstone told the Authority that the terms of the 27 November 2019 email were never accepted. Mr Hartstone said it was implausible that Mr Zawadzki could have thought they had been accepted because Board approval would have been required, and this was never obtained. Mr Hartstone said he explained this to Mr Zawadzki.

[19] Mr Zawadzki was unable to produce any evidence that his 27 November 2019 proposal had been accepted.

[20] Given the importance of whether Mr Zawadzki's 27 November 2019 proposal was accepted or rejected by Hydroxsys, the parties were directed to conduct a further search for any related correspondence after the conclusion of the investigation meeting.

The information provided by both parties was considered by the Authority as part of reaching its findings of fact.

[21] During the months between November 2019 and February 2020 Mr Zawadzki's level of engagement with Hydroxsys increased. There was a hum of activity in the business at the time spurred on by the commercial potential of Hydroxsys' product and Mr Zawadzki worked to identify potential sales opportunities and investment.

[22] Mr Zawadzki's continued involvement over time was likely because he considered the positive tone of the conversations between him and Mr Hartstone meant that if he were to introduce an investor to the company he would be well positioned to insist on an appropriate payment or issuance of equity.

The 18 February 2020 meeting

[23] On 18 February 2020 Mr Zawadzki and Mr Hartstone met to discuss how he was being engaged to provide services to the business. Mr Zawadzki felt that the level of work he was undertaking and the engagement he was having with third parties (such as investors and potential clients) meant it was appropriate he become an employee.

[24] At the 18 February 2020 meeting Mr Hartstone and Mr Zawadzki discussed the work Mr Zawadzki was to perform for the company, and as Mr Zawadzki put it the "scope of his role".

[25] Mr Zawadzki proposed a set of terms on which he said he would be happy to be employed. These included a salary of \$250,000USD and stock options. Mr Hartstone did not accept those terms but wished for Mr Zawadzki to become an employee and said that he could offer full-time employment on a salary of \$180,000.

[26] Mr Hartstone told the Authority that the offer of employment he made to Mr Zawadzki was rejected, and that Mr Zawadzki "proceeded on the basis of acting like a contractor".

The working relationship in 2020

[27] The working relationship between Mr Zawadzki and Hydroxsys changed after the 18 February 2020 meeting. Mr Zawadzki was immediately given key card access to

the building, regularly attended the office and worked alongside other members of the Hydroxsys team.

[28] The evidence showed Hydroxsys wished for Mr Zawadzki to provide his services and was willing to have him as an employee. Over the coming months, Mr Zawadzki:

- a. Worked from Hydroxsys' offices alongside and in collaboration with Hydroxsys' team, including having key card access;
- b. Was referred to in a range of internal and investor facing documents as being Hydroxsys' Chief Revenue Officer and as being on the executive team;
- c. Attended Board meetings to provide updates on progress with sales;
- d. Assisted with work on sales proposals;
- e. Made operational arrangements for Hydroxsys in relation to matters such as shipping expensive equipment to clients;
- f. Conducted a broader range of duties than he was initially engaged to undertake which were consistent with his being given instructions by Hydroxsys' CEO. These duties included supporting work such as procuring equipment, coordinating and picking up waste samples and carrying out negotiations with laboratories used by Hydroxsys;
- g. Used a Hydroxsys email address with an email signature referring to him as "Jan Zawadzki, Business Development";
- h. Performed work under instruction from Mr Hartstone;
- i. Travelled to perform work for the Hydroxsys, which the company arranged and paid for; and
- j. May have appeared to potential investors and clients as if he was employed by Hydroxsys.

[29] Mr Zawadzki was not involved in a recruitment process for the role of Chief Revenue Officer at Hydroxsys. He did not submit a CV and was not formally interviewed prior to commencing work. Rather, Hydroxsys became aware of his professional characteristics and abilities during the latter months of 2019 when he performed work for them.

[30] Between February and October of 2020 Mr Zawadzki had a considerable degree of autonomy over when, how and where he worked. There were no specific expectations about when he would be in the office or when his work would be done.

[31] Mr Hartstone's evidence was that Mr Zawadzki was frequently unavailable and that he did not play a significant role in directing how Mr Zawadzki worked day to day.

[32] As part of preparing for the Authority's investigation meeting, Hydroxsys undertook an analysis of Mr Zawadzki's use of email and other systems while he was working for it. Hydroxsys claimed that the volume of emails and meetings per week was too low to show that Mr Zawadzki was as a full time employee because he only sent approximately 21 emails per week and he attended on average only two meetings per week. This analysis did not, however, deal with other systems or types of work Mr Zawadzki may have done at the time, which he described as being of a consistently high volume or with other communication systems Mr Zawadzki said he used.

[33] Hydroxsys further said that Mr Zawadzki's efforts did not produce revenue for it and that if he had provided no work for it that it would not have made any difference to its operations. This evidence was said by Hydroxsys to demonstrate that Mr Zawadzki was in control of his own time.

[34] It should be noted for the sake of context that during this period in New Zealand the COVID-19 pandemic impacted how people worked, including that people were required to work from home for approximately five months during and between March and August 2020.

[35] Mr Zawadzki was also free to perform advisory work for other companies during this time, and did so. Mr Zawadzki said he provided mentoring and advisory services to two business he had relationships with. He estimated this to involve less than a day's work per month. Hydroxsys claimed it had suspicions that Mr Zawadzki was doing more work for these other companies than he had said he was, but did not take any steps to deal with this as a concern at the time.

[36] An unusual feature of the relationship was that Mr Zawadzki was never paid during the time he performed work for Hydroxsys, nor did he ask to be paid.

Accordingly, he did not receive any statutory entitlements such as holiday pay or other leave.

[37] Hydroxsys said Mr Zawadzki was never paid because he never rendered an invoice. Mr Zawadzki said he had personal means such that generating an income was at the time not critical to his ability to fund his living expenses and that he agreed to defer payment to preserve the company's cash reserves. He said that this was why he was prepared to forgo earning a salary while working for Hydroxsys. It also appears that Mr Zawadzki was operating on the assumption that he at least had some claim to be operating in accordance with his 27 November 2019 email.

The employment agreements

[38] Mr Hartstone told the Authority that he provided Mr Zawadzki with a proposed employment agreement soon after the 18 February 2020 meeting. He said he expected Mr Zawadzki would propose changes to the agreement, but that Mr Zawadzki never provided an amended version of the agreement for him to consider. The draft agreement was never signed.

[39] Mr Hartstone said that Hydroxsys asked Mr Zawadzki for invoices at various times during 2020, but he did not provide one. No documentary evidence was produced to support this position.

Mr Zawadzki takes another role and is offered part-time work by Hydroxsys

[40] On 19 October 2020 Mr Zawadzki commenced full time employment with another company and his work for Hydroxsys diminished significantly.

[41] In November 2020 Hydroxsys sent a part-time employment agreement to Mr Zawadzki. Hydroxsys' motivation for proposing this agreement was said to be that it was going into another round of raising capital, and it wished to be able to call on Mr Zawadzki. This agreement was also not executed by the parties.

[42] After Mr Zawadzki started his role with another company in October 2020, he only engaged with Hydroxsys in a limited and ad hoc manner, which was more consistent with the relationship the parties initially had between November 2019 and February 2020.

[43] In January and February 2021, in the context of steadily decreasing engagement between the parties, Mr Zawadzki sought meetings with Mr Hartstone but did not receive a reply.

[44] There was no formal discussion about how or why the relationship between the parties would end, but Mr Zawadzki's email access was cut off on 31 March 2021 and no further work was performed for Hydroxsys by Mr Zawadzki.

Mr Zawadzki claims he was entitled to be paid as an employee

[45] On 18 October 2021 Mr Zawadzki wrote to Mr Hartstone asserting that a \$170,000 salary had been agreed in February of 2020, and seeking payment of 8 months' wages inclusive of tax which he calculated as being \$113,333.00.

[46] After not receiving a response from Mr Hartstone to his 18 October 2021 email, Mr Zawadzki wrote to members of Hydroxsys' Board on 26 October 2021 saying that he was seeking payment of wages for work done over "8+ months working full time for Hydroxsys" based on a verbal agreement with Mr Hartstone. Mr Zawadzki's email went on to say "By October 2020 I came to the conclusion that Hydroxsys [sic] products were not at a stage where ongoing commercial sales effort made sense, so Mark and I agreed that I'd step away for a while until products matured enough to support commercial sales."

[47] On 29 October 2021, Mr Hartstone responded saying that Hydroxsys had only ever intended to engage him as a contractor. Mr Hartstone acknowledged that Mr Zawadzki had performed work for the company and offered him a payment of \$50,000 as full and final settlement. In his evidence before the Authority, Mr Hartstone said he considered this was a fair amount to cover the work Mr Zawadzki had performed for the company.

Was Mr Zawadzki employed by Hydroxsys?

Relevant law

[48] Section 6 of the Act defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service. The section then requires

the Authority, in deciding whether a person is an employee, to determine “the real nature of the relationship between them”.¹

[49] In making this assessment the Authority must consider all relevant matters, including matters that indicate the intention of the parties, but must not treat any label applied by the parties as determinative of the nature of their relationship.² This is a reference to ascertaining the parties’ common intention about the substance of their mutual rights and obligations, objectively ascertained. Accordingly, the parties’ respective subjective intentions are irrelevant to the question of the “real nature” of the relationship³.

[50] These statutory provisions are informed by the caselaw which has developed on the topic, which establishes principles for determining the “real nature” of the relationship. The inquiry into the “real nature” of the relationship is intensely factual and is to be objectively assessed. It turns on what a reasonable person would understand the substance of the relationship to be.

[51] The Authority is to first consider the parties’ mutual rights and obligations as set out in any contractual documentation, then review any divergence from these documents apparent in the way the relationship worked in practice.

[52] Following this analysis, it is appropriate to apply the tests as articulated in *Bryson v Three Foot Six Limited*⁴ where the Supreme Court confirmed the following tests are to be applied when analysing the “real nature” of the relationship. These are the “control test”, the “integration test” and the “fundamental or economic reality” test.

Intention of the parties, and how it changed in February 2020

[53] The parties each accept that Mr Zawadzki was initially an independent contractor. The NDA, signed at the start of their working relationship in November 2019, provided a basic framework for the nature of the parties’ relationship and for how rights and obligations relating to intellectual property and confidential information would be dealt with.

¹ Section 6(2) of the Employment Relations Act 2000

² Section 6(3) of the Employment Relations Act 2000

³ *Rasier Operations BV v E Tū Inc* [2024] NZCA 403 at para [211]

⁴ [2005] NZSC 34

[54] However, for the reasons that follow, it is likely that the parties agreed to enter an employment relationship during the 18 February 2020 meeting.

[55] Both parties gave evidence that they wished for the relationship to become one of employee and employer, and the meeting on 18 February 2020 was to discuss the terms on which this would occur. The relationship potentially evolving in this way was also foreshadowed in Mr Zawadzki's 27 November 2019 email when he said that if the services he was to provide changed, compensation would need to be discussed.

[56] Proposals for terms and conditions of employment were made in the 18 February 2020 meeting by both parties. Hydroxsys claimed that Mr Zawadzki rejected its proposed terms of employment, meaning no employment relationship was formed. However, it then engaged Mr Zawadzki in a manner that was largely consistent with him having agreed to the terms it had proposed, including the factors identified in paragraph [28] above. In this way, by its conduct Hydroxsys demonstrated an intention to create and then be party to an employment relationship.

[57] The fact no employment agreement was executed after the 18 February 2020 meeting is a factor weighing against the parties' having intended for Mr Zawadzki to become an employee. However, there was also no independent contractor agreement, or other documentation providing terms for the services that Mr Zawadzki performed. This dearth of written material does not mean the parties could not orally agree an employment relationship and then affirm it by conduct, which is what I find occurred.

[58] Accordingly, although Hydroxsys claimed that it did not intend to enter into an employment relationship with Mr Zawadzki, this is not consistent with its actions at the time of negotiating terms and conditions of employment with him and then allowing him to perform the role that would have been materially the same as the one he would have performed under the written agreement it tried to enter into and which involved a much wider range of work than was proposed in the 27 November 2019 email.

[59] It is therefore reasonable to also impute to Hydroxsys an intention to enter into an employment relationship with Mr Zawadzki, even if Mr Hartstone expressed the view in the Authority's investigation meeting that the parties were still negotiating the written terms of their engagement.

[60] It is notable that Mr Zawadzki was not paid for his work. This could be said to mean there was no contractual relationship created between the parties for lack of consideration. However, the parties had no relationship other than one based on their respective commercial interests and Mr Zawadzki said he had agreed to defer payment to protect the company's cash reserves.

[61] Mr Zawadzki gave evidence that he expected to be financially rewarded for his work. The Authority therefore finds the parties agreed to defer payment, not that no payment was required, so the requirement for consideration to establish an enforceable contractual relationship was therefore met.

[62] Sufficient certainty of agreement was also achieved such that the parties were able to work together in a manner resembling that of employee and employer.

[63] The 18 February 2020 meeting was a watershed in the parties' working relationship. The evidence supports a finding that after that meeting the parties intended for Mr Zawadzki to become, and perform work as, an employee.

Written arrangements between the parties

[64] The NDA was the only executed written agreement between the parties. The main purpose of entering the NDA was to provide Hydroxsys with confidence that its confidential information and intellectual property was secure.

[65] The NDA is a relevant document, and it said that its terms did not create a relationship of employment between the parties. This does not, however, mean the relationship could not change over time, rendering the label the parties placed on themselves in the NDA no longer descriptive of the real nature of the relationship.

[66] The way the parties worked together after 18 February 2020 was not consistent with the NDA being the document exclusively governing their relationship. The rights and obligations of the parties after that time exceeded those created by the NDA, such as making representations on each other's behalf to third parties. For these reasons the NDA cannot be regarded as defining the full extent of the contractual framework between the parties after 18 February 2020.

[67] It is settled law that an independent contractor relationship may evolve into an employment relationship over time. In this case, the parties' relationship changed on 18 February 2020 in a manner which evolved past the rights and obligations created by the NDA.

Label applied by the parties

[68] Section 6 of the Act says the Authority "is not to treat as a determining matter any statement by the persons that describes the nature of their relationship". It is also correct that the Authority should not lightly set aside any label applied by the parties to themselves.

[69] In this case, after the February 2020 meeting there was no written agreement recording a label the parties were applying to themselves. Given the Authority has determined that the February 2020 meeting was a turning point in the relationship between Mr Zawadzki and Hydroxsys, the NDA's relevance and the label within it must be viewed in light of this change in the relationship.

[70] The NDA recorded that nothing in that agreement constituted a relationship of employment. This correctly reflected the parties' relationship over the months following its execution. However, the NDA's terms did not purport to prevent an employment relationship developing in future. Rather, the NDA merely said it did not create a relationship of employment.

[71] The NDA was signed at a time when Hydroxsys wished for its IP and confidential information to be protected in order for Mr Zawadzki was to present it to potentially interested parties in the United States, but did not provide any real detail of how the parties would operate in their working relationship. For example, it did not prescribe the work to be performed or the ways in which each party could expect the other to behave when performing the work.

[72] Accordingly, the NDA's labelling of the parties as not in an employment relationship is not of assistance to the Authority in determining the real nature of that relationship during the period after 18 February 2020.

The Control Test

[73] Mr Hartstone's evidence was that Mr Zawadzki was essentially free to perform his work when and how he pleased, and that he said he cared only about the results. In this way Mr Zawadzki had flexibility to work and perform his work in a way that he felt appropriate.

[74] The Authority was therefore able to place only limited weight on Hydroxsys' analysis of Mr Zawadzki's use of email systems and attendance at meetings because it could not be said to be a comprehensive account of the work he actually performed.

[75] This lower level of control over Mr Zawadzki's ways of working and how he performed is not uncommon for senior employees who may operate with a high degree of their employer's trust. Some senior employees essentially "make their own work" as they perform to deliver on their function. Mr Zawadzki's role was closer in nature to this type of working relationship.

[76] However, the performance of Mr Zawadzki's work was controlled by Mr Hartstone in that Mr Hartstone could, if he wished, direct Mr Zawadzki to engage in specific projects or other work. Mr Hartstone could also direct Mr Zawadzki to engage with third parties in particular ways. Sometimes work would be asked for at short notice and on timing determined by Mr Hartstone, as they worked alongside each other at Hydroxsys' offices.

[77] In these ways the control exerted over Mr Zawadzki's performance of his work by Hydroxsys, although relatively loose in terms of the flexibility he was afforded as a senior person, was consistent with his being employed by the company.

[78] If it is correct, as Hydroxsys claimed, that Mr Zawadzki's work did not produce revenue or make any commercial difference to it, that is a matter that could have been managed at the time given the nature of the relationship and does not in and of itself show the relevant hallmarks of control over Mr Zawadzki's work were not present.

The Integration Test

[79] The “integration test” assesses the extent to which Mr Zawadzki was “part and parcel” of Hydroxsys’ organisation and is a critical component of the analysis of whether a person was an employee or independent contractor.

[80] Although Mr Zawadzki was an experienced businessman who presented with a sophisticated skillset, between February and October 2020 he did not provide these skills in an arms-length manner as may be expected of an independent contractor. For example, if Mr Zawadzki had been engaged to provide discrete packets of work for which he could invoice, such a way of working may have been more readily assessable as being an independent contracting relationship.

[81] Rather, in addition to providing strategic business development and revenue related work, Mr Zawadzki was involved in a range of tasks that were not directly related to his experience, seniority or skillset. Such tasks included supporting intellectual property and trademark related issues, assisting with a recruitment process in respect of a senior role, supporting negotiations with labs and chemists, arranging shipping of equipment and directly working on testing of product.

[82] Although Mr Zawadzki’s work was principally focussed on his skillset, which could have been consistent with his being an independent contractor, it is the fact that Mr Zawadzki’s work evolved over time and that he was drawn into various other activities within the business which points to him being integrated into Hydroxsys’ business as an employee. Put another way, the performance of a range of tasks to support the business is more consistent with a contract of service than it is a contract for services.

[83] Mr Zawadzki’s use of Hydroxsys systems, including its email system and offices is also an indication of his integration into the business in a way consistent with his being an employee, albeit a less powerful indication than the diversity of tasks he performed.

The fundamental or economic reality test

[84] The “fundamental test” assesses whether Mr Zawadzki was in business on his own account or whether he was working in Hydroxsys’ business.

[85] At the commencement of the parties' relationship in November 2019, Mr Zawadzki could be fairly said to be in business on his own account in that he offered a commercial proposition to Hydroxsys in exchange for a particular set of specialist services. That the terms of his 27 November 2019 email were not accepted does not disturb this fact because in the months following his proposal he continued to attempt to add value in a specific way which he felt may generate reward for him.

[86] However, as with the other realities of the relationship referred to above, the content of and conduct after the 18 February 2020 meeting changed this position. Although Mr Zawadzki's remuneration was deferred, he was no longer acting as if in business on his own account – rather he was participating in the work of the company as part of its business.

[87] Mr Zawadzki's business experience, seniority and financial non-reliance on Hydroxsys muddy the water in determining whether he was in business on his own account because these factors indicate a level of independence from Hydroxsys. Similarly, the fact he provided limited advisory services to third parties is a factor which could show Mr Zawadzki was working in business in his own right. However, in the full context of the relationship, each is better interpreted as a factor that informed Mr Zawadzki's bargaining power in the relationship and the ways he was prepared to work (such as not receiving a regular salary), rather than as showing he was in business on his own account.

[88] Mr Zawadzki did not have a widget to sell to Hydroxsys nor would he have been able to realistically subcontract the work he performed between 20 February 2020 and 18 October 2020, because it was personal to him. In these ways he was reliant on Hydroxsys allowing him to perform the work in order for him to be paid for it, indicating a fundamental economic reality of not being in business on his own account at the time.

How other members of the executive team were engaged

[89] The Authority was told that during 2020 all other members of the Hydroxsys executive team were engaged as independent contractors. Hydroxsys claimed this demonstrated that it intended to engage Mr Zawadzki in the same way.

[90] Although this factor could be taken into account in considering all the circumstances of the case, no detailed evidence of those arrangements was provided to the Authority. In any case, whether others were engaged as independent contactors is not necessarily a persuasive factor in determining the real nature of the relationship in all the circumstances of Mr Zawadzki's case.

When Mr Zawadzki stopped performing his role

[91] The role performed by Mr Zawadzki for Hydroxsys came to an end when he made the decision to "step away" and take up full time employment with another company on 18 October 2020.

[92] Consistent with the lack of documentation between the parties regarding the employment relationship up to that date, there was no formal notice given at the time. Rather Mr Zawadzki said he was going to take up another role but would still be available for ad hoc work as needed.

[93] The parties appear to then have attempted to negotiate a part-time employment agreement, but failed to achieve agreement on terms. Given Mr Zawadzki had no fixed hours after this time and performed more narrow ad hoc work, he is likely to have reverted to being an independent contractor providing discrete services at this point. He no longer attended the office or undertook the broad range of work he had done during the period between 20 February 2020 and 18 October 2020.

Taxation

[94] Deduction of PAYE (in the case of employees) or Withholding Tax (as is often utilised in the case of independent contractors) can be an indicator of how the parties viewed the relationship in practice.

[95] However, Mr Zawadzki never received payment for his work for Hydroxsys and said he did not complete a tax return referring to Hydroxsys. Accordingly no Withholding Tax or PAYE deductions were made in relation to Mr Zawadzki's work for Hydroxsys and no real assistance can be drawn from how the parties may have treated this element of their relationship.

Outcome

[96] It is clear there was a level of informality to the way in which the parties chose to work together. This is both in the sense that the dynamic between the individuals involved was informal in nature and also in that there was informality in the contractual arrangements.

[97] Given Mr Zawadzki's email of 27 November 2019 was not accepted by Hydroxsys, and Mr Hartstone's evidence was that it was orally rejected, it is not capable of constituting a contractual foundation for the parties' relationship.

[98] However, the 27 November 2019 email does demonstrate that Mr Zawadzki was not an unsophisticated or vulnerable party. Rather, Mr Zawadzki had formed the view that his involvement with Hydroxsys would be valuable to it and that he believed he would be capable of bargaining some kind of value in return.

[99] It was on this basis that Mr Zawadzki continued to work for Hydroxsys between November 2019 and February 2020, at which point he met with Mr Hartstone to discuss becoming an employee.

[100] The 18 February 2020 meeting did not result in a written employment agreement. However in the meeting Mr Zawadzki was clear that he wished to be an employee and, similarly Hydroxsys said it wanted to employ him. Both parties then behaved in a manner consistent with him being an employee. The analysis of the legal tests set out above must be seen in this context and support this conclusion.

[101] Whilst there are some indicators that Mr Zawadzki was in business on his own account, they are not enough to displace the reality that he performed a wide range of work on behalf of Hydroxsys under the control of Mr Hartstone. As set out above, Mr Zawadzki's relationship with Hydroxsys changed from being a commercial arms-length arrangement after the 18 February 2020 meeting, and he became integrated into the functioning of the business.

[102] Although Mr Zawadzki claimed to have been employed through to February 2021, this does not reflect reality or the claim he made for payment on 18 October 2021. Rather, Mr Zawadzki ceased to be an employee when he commenced as a full-time

employee for another company in October 2020 and that he provided only ad-hoc independent contracting services after this time.

Summary

[103] The Authority finds that Mr Zawadzki was employed by Hydroxsys between 18 February 2020 and 19 October 2020.

[104] The Authority's task in investigating the preliminary matter of whether Mr Zawadzki was an employee of Hydroxsys did not extend to establishing the quantum of any wage arrears that may be owing. The parties are now encouraged to attempt to undertake that task between themselves and are directed to attend mediation again within 28 days of the date of this determination.

[105] The parties may benefit from having particular regard to Mr Zawadzki's 18 October 2021 assertion that a salary of \$170,000 reflected the terms of remuneration the parties had agreed.

[106] If matters are not successfully resolved directly between the parties, Mr Zawadzki is to notify the Authority of the same so that a case management conference can be set down to establish how the substantive issue of any wage arrears owing to Mr Zawadzki may progress.

Costs

[107] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[108] If they are not able to do so and an Authority determination on costs is needed Mr Zawadzki may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Hydroxsys would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[109] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Matthew Piper
Member of the Employment Relations Authority

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.