

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 48  
EMPC 355/2023**

IN THE MATTER OF      an application for a declaration under s 6(5)  
   of the Employment Relations Act 2000

BETWEEN                      CRAIG BROWN  
   Plaintiff

AND                              THE CLINICIAN HOLDINGS LIMITED  
   Defendant

Hearing:                      21–25 October 2024

Appearances:              M Kilkelly, counsel for plaintiff  
   M McGoldrick, counsel for defendant

Judgment:                    17 March 2025

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**JUDGMENT OF JUDGE M S KING**

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[1]      This case concerns whether Craig Brown was an employee or an independent contractor of The Clinician Holdings Ltd (TCHL) from 1 June 2022 to 31 March 2023.

[2]      Mr Brown has applied for a declaration pursuant to s 6(5) of the Employment Relations Act 2000 (the Act) that he was employed by TCHL at all material times. TCHL contends that Mr Brown provided his services as an independent contractor.

**Background**

[3]      TCHL is a start-up medical information technologies business which needed accountancy and financial support.

[4]      Mr Brown is a qualified and experienced chartered accountant. Between 2016 and 2022 he operated a consultancy business, Surestart Consulting Ltd (Surestart).

Through that business he supplied virtual Chief Financial Officer (CFO) and financial advisory services to new technology companies. Surestart engaged the services of Michael Huang, a subcontractor, who could undertake day-to-day financial tasks in the nature of a Financial Controller/Accountant at a lesser rate for Surestart clients. Surestart had a regular stable of startup clients, and its fee revenue for the financial years ending March 2020 to 2022 on average was more than \$350,000.

[5] On 25 February 2021 Surestart entered into a written independent contractor agreement with TCHL where it was agreed:

- (a) Mr Brown would provide financial advisory services in the nature of a CFO at a rate of \$300 per hour (plus GST);
- (b) Mr Huang would provide financial accountant services at a rate of \$150 per hour (plus GST); and
- (c) Surestart would issue monthly invoices for the work performed by Mr Brown and Mr Huang.

[6] In accordance with this agreement, Mr Brown worked approximately 20 hours per month, charging TCHL for his and Mr Huang's time. The contractor relationship between Surestart and TCHL operated this way until 31 May 2022.

[7] In late 2021 TCHL wanted Mr Brown to become its full-time CFO at a lower rate. There were a series of communications and meetings between Ron Tenenbaum, Chief Executive Officer of TCHL, and Mr Brown before a verbal agreement was reached. The parties accept that the agreement provided for Mr Brown to work for TCHL on a full-time basis from 1 June 2022. However, they dispute the nature of the working relationship. Mr Brown asserts that, from this date, he commenced employment with TCHL as their full-time CFO, whereas TCHL asserts that its independent contractor arrangement with Surestart remained and that Mr Brown continued as an independent contractor, but on a full-time basis.

*The parties negotiated for Mr Brown to work for TCHL on a full-time basis*

[8] On 24 October 2021 Mr Brown and Mr Tenenbaum met to discuss Mr Brown's work for TCHL. The parties dispute the specifics of what was discussed at this meeting but agree that at about this time they began to discuss the idea of Mr Brown taking on a larger role at TCHL.

[9] On 12 and 24 November 2021 Mr Brown and Mr Tenenbaum attended weekly catchup meetings. Mr Brown says that at these meetings they discussed his package and remuneration. He also says that Mr Tenenbaum told him on 24 November 2021 that the Board had approved an Employee Share Ownership Plan (ESOP) and that he would be given an offer at the end of the week. Mr Brown produced copies of his handwritten meeting notes from these meetings, which supported his recollection of what occurred. Mr Tenenbaum accepts that the parties had weekly catchup meetings; however, he does not recall making any of the above statements to Mr Brown. Mr Tenenbaum instead says that Mr Brown was assisting the Board with the creation of an ESOP and that the ESOP was not for Mr Brown.

[10] In November 2021 Mr Brown informed Mr Huang that Mr Tenenbaum had offered him employment as the full-time CFO of TCHL. Mr Brown told him that the CFO salary would be about half as much as he was currently earning through Surestart; however, he told Mr Huang that Mr Tenenbaum was offering him shareholding in the business as part of the deal and that details were still being discussed.

[11] Mr Brown and Mr Tenenbaum met on 14 April 2022. The parties have very different recollections of what was said and agreed at this meeting. Mr Tenenbaum accepts that he offered Mr Brown a full-time position with TCHL with remuneration of \$200,000 per year starting from 1 June 2022. However, the parties disagree over whether the offer was for an employment relationship or a continued independent contractor arrangement. The parties also disagree as to whether Mr Brown was offered a two per cent shareholding in TCHL. Further, they disagree over what was said about what Mr Brown would do to wind down Surestart. I discuss these conflicts in more detail below.

[12] From May 2022 Mr Brown began informing Surestart's clients of his decision to move to new full-time employment at TCHL and that he would no longer be able to provide CFO services. He put Mr Huang in direct contact with a number of clients who expressed an interest in continuing to use his services as a financial accountant or who required interim support while they made alternative arrangements.

*The parties never put the April 2022 agreement in writing*

[13] Mr Brown says that Mr Tenenbaum repeatedly committed to putting the agreement reached on 14 April 2022 in writing. Mr Tenenbaum denies making any such commitment.

[14] On 3 May 2022 Mr Tenenbaum's assistant, Oanh Nguyen, prepared a job description for the CFO role and sent it to Mr Tenenbaum with a message asking whether it should be sent to Mr Brown for a review. Mr Tenenbaum responded that he would "like to have a think before we share it with [Mr Brown] for his comments."

[15] On 20 May 2022 Ms Nguyen messaged Mr Tenenbaum about the draft job description and queried whether she should "incorporate it into the agreement?" Mr Tenenbaum replied saying:

Tam [Chief Commercial Officer and Co-founder] is not quite sure [Mr Brown] is the right CFO for us so I would like to spend some time with the JD before I send him the offer.

[16] By 1 June 2022 the parties had not signed any written agreement to record their new full-time work arrangement.

[17] Mr Brown's evidence is that he regularly brought up the need for a written agreement during his weekly catchup meetings with Mr Tenenbaum. Mr Brown refers to his notes from a catchup meeting on 23 June 2022 in which he records TCHL's lawyer's name and an arrow pointing to the word "employment", to support his recollection that TCHL's lawyer was working on his employment agreement.

[18] On 22 June 2022 Ms Nguyen contacted Mr Brown querying Surestart's May 2022 invoice, which was at the agreed part-time contractor rate of \$300 per hour. Mr

Tenenbaum had informed her in mid-April that Mr Brown's rate would reduce to \$95 per hour as per the "full-time agreement". Mr Brown responded that he had agreed to be full-time from 1 June 2022 but at a rate of \$200,000 per annum and that he needed to check what Mr Tenenbaum understood prior to this. He also wrote "we need to do the employment agreement."

[19] Mr Brown messaged Ms Nguyen later that night confirming that the May invoice was fine and that it would be the last month he would be paid at his consulting rates. He advised that he would "send [Mr Tenenbaum] a set of bullet points for the drafting of my employment agreement and he will instruct [the lawyer] to prepare this agreement."

[20] On 28 June 2022 Mr Brown messaged Ms Nguyen and queried whether he should send a "[S]urestart invoice for the equivalent of 1 month salary for June, [Mr Tenenbaum] and I are still needing to write-up my employment agreement."

[21] On 26 July 2022 Ms Nguyen messaged Mr Brown advising that she was organising payroll and stated "I'd like to check if you have finalised the employment agreement with [Mr Tenenbaum] or you will send [an] invoice for [July]." Mr Brown advised that they had been too busy that month and that he would send an invoice and try and sign off the agreement the following month.

[22] On 25 and 29 August 2022 there were further messages between Ms Nguyen and Mr Brown regarding finalising the employment agreement with Mr Tenenbaum and whether Mr Brown would continue to issue invoices until this was completed. Mr Brown messaged her "let me send [Mr Tenenbaum] the terms for [the lawyer] to put onto our standard agreement and then [Mr Tenenbaum] and I can execute this."

[23] Ms Nguyen messaged Mr Tenenbaum, forwarding Mr Brown's message above and querying whether Mr Brown should be included on the August 2022 payroll. Mr Tenenbaum responded: "As for [Mr Brown] we are yet to negotiate any contract so for the time being he can submit an invoice". Mr Tenenbaum maintains that this was a quick message to Ms Nguyen over an application called Slack and that he did not

believe they had agreed to Mr Brown being an employee; he said Mr Brown was just continuing to provide a service until a new agreement was formalised.

[24] On 19 September 2022 Mr Brown emailed Mr Tenenbaum as follows:

Hi Ron,

Can we ask [the lawyer] to put the following employment terms into an IEA and Share letter as follows:

**Employment Agreement :**

Employment for Craig Brown, Chief Financial Officer, reporting to Ron Tenenbaum

Salary \$200,000 per annum

Start date 1 June 2022

**Share based incentives:**

To be allocated 2% Share equity. This will be either entirely through ESOP or partly through ESOP and balance through a written agreement with Ron to transfer shares to Craig to make up the rest of the 2% where the allocation of the 2% cannot be filled from the ESOP.

- Strike price for shares as Nominal for example \$0.01 / share

**BYOD**

Ron To confirm.

There is a significant saving to the [company] in cash outlay (existing assets costs \$6,785 exc GST) for the company if I bring my own devices suitable for CFO role (Macbook, i-Phone, i-Pad etc), can we agree a monthly reimbursement to fund these devices circa \$200/ month ( = 36 month replacement cycle),

...

[25] Mr Tenenbaum did not respond to the email. He maintains that Mr Brown's email did not reflect what they had agreed. He maintains that at the time he was very busy, that his normal approach was to discuss with a person if their views were misaligned, and that he recalled telling Mr Brown that they were misaligned on the contents of the email.

[26] However, Mr Brown denies that he had such a discussion with Mr Tenenbaum. On 5 October 2022 there were further messages between Mr Brown and Ms Nguyen where Mr Brown advised that Mr Tenenbaum had been too busy with other company business to finalise his employment agreement. If Mr Tenenbaum had informed Mr Brown that he was "misaligned", I consider it unlikely that Mr Brown would have told Ms Nguyen that Mr Tenenbaum was merely too busy. In the absence of any

corroborating evidence for Mr Tenenbaum's position, I accept Mr Brown's evidence that Mr Tenenbaum did not tell him that he was misaligned.

*Relevant conduct of the parties from 1 June 2022*

[27] From 1 June 2022 Mr Brown undertook TCHL's CFO role on a full-time basis. He increased his hours of work for TCHL from an average of five hours per week to approximately 50 hours per week. Mr Brown worked in TCHL's office most days.

[28] Mr Brown largely took over the Financial Accountant tasks that were previously undertaken by Mr Huang through Surestart. This included preparation of TCHL's quarterly reports and financial statements and also responsibility for overseas payroll. Mr Huang performed further work related to TCHL in June 2022 and November 2022; however, those two situations were exceptions. The work performed in June 2022 related to work he had carried out in May 2022. The November 2022 work arose as a result of him responding to Mr Brown's questions about inconsistent journal entries and the correction of coding of transactions relating to historical errors Mr Brown laid at the feet of the previous CFO. This was a sensitive topic as the previous CFO was a co-founder, director and shareholder of TCHL and was also closely related to Mr Tenenbaum. Mr Brown did not feel comfortable bringing these transactions and Mr Huang's work to uncover them to the attention of the Board and investors due to the serious negative implications as to the integrity of the previous accounts. Because of this, Mr Brown did not charge TCHL for Mr Huang's time; he covered the costs himself.

[29] For the next few months following 1 June 2022, Mr Brown continued working on Surestart client matters as he transferred them to new advisors and completed residual handover work. During this time, he also declined to take on new clients for Surestart. Mr Tenenbaum recalls Mr Brown completing work for other Surestart clients, but he does not recall Mr Brown telling him that he was handing over his responsibilities for his clients to other providers.

[30] Mr Brown was able to submit and be reimbursed for expense claims he incurred on TCHL's behalf, which he previously did not do as a contractor. He continued to use his own computer and mobile phone, but he was also reimbursed by

TCHL for a computer screen. He used his own Dropbox account to enable him to continue to use Excel spreadsheets, for which TCHL gave him a Microsoft licence; TCHL preferred to use Google Suite rather than Microsoft Office. Mr Tenenbaum became uncomfortable with Mr Brown storing TCHL's financial information in his personal Dropbox account, so Mr Brown gave Mr Tenenbaum a link to access his Dropbox folder, which ceased when his relationship with TCHL ended in March 2023.

[31] Mr Brown did not have access to a TCHL credit card. He was also not granted authorisation rights to its bank account. He had the ability to set up payments in its bank account, but he did not have authorisation rights. Mr Brown also did not have access to a number of databases within Google Suite which held TCHL intellectual information. Mr Tenenbaum says that these factors support his view that Mr Brown was not a core part of TCHL's management team.

[32] After 1 June 2022 Mr Brown was able to take paid annual holidays and one day of paid sick leave. On 20 December 2022 he and Ms Nguyen emailed confirming the holiday and sick leave he had taken from June 2022 to December 2022, which included 12.5 days of annual holidays and one day of sick leave.

[33] Mr Brown was paid an hourly rate without any deduction, despite him not working the 10 public holidays that occurred between 1 June 2022 and March 2023. Mr Tenenbaum maintains that all contractors and employees of TCHL obtained the same benefits and holidays. He also maintains that Mr Brown's services were for monthly periods, and he denies that TCHL made any specific payments for public holidays.

[34] Prior to 1 June 2022 Mr Brown was recorded as working "Part-time" as a "Freelancer" on TCHL's employee/contractor spreadsheet. This spreadsheet was prepared by Ms Nguyen and used for staff payments. After he began his full-time position on 1 June 2022, the spreadsheet was changed, with Mr Brown now being recorded as working "Full-time" as an "Employee".

[35] On 13 October 2022 Ms Nguyen requested Mr Brown's personal information for TCHL's employee records.

[36] Mr Brown was presented as TCHL's CFO and part of the senior management team in IRD documents, banking documents, documents to staff, pitch decks which were given to investors, and TCHL's business plan. Mr Tenenbaum accepts the above; however, he maintains that TCHL's head of research and development, who is also part of its management team, is a contractor and that the above factors do not mean Mr Brown was an employee of TCHL.

*TCHL terminated its relationship with Mr Brown*

[37] By late 2022 TCHL had concerns over the services Mr Brown was providing. His work was being overseen by the previous CFO. The Board had formed the view that Mr Brown was simply "plugging numbers" into spreadsheets and not using formulae, which made the data difficult to use and his reports difficult to understand. Mr Tenenbaum admits that TCHL did not put these concerns into writing, but he said that he had ongoing conversations with Mr Brown about them.

[38] Mr Tenenbaum's evidence is that around November or December 2022 he started thinking about ending TCHL's relationship with Mr Brown. He was disappointed that Mr Brown had taken annual leave when TCHL was going through a fundraising round, which was a very volatile time regarding the business's finances. However, his focus was on getting investment completed by the end of the 2022 year.

[39] Around this time Mr Tenenbaum prevented Mr Brown from attending Board meetings. The Board began discussing removing Mr Brown and having his work audited. Mr Tenenbaum did not feel that he could remove Mr Brown immediately and needed to make arrangements for a handover to another CFO. In January 2023 he started having conversations with a virtual CFO provider.

[40] Once that arrangement was made, Mr Tenenbaum met with Mr Brown at their regular weekly meeting on 1 March 2023. He advised Mr Brown that TCHL would be terminating their agreement at the end of the month and that it would be appointing a virtual CFO. Mr Tenenbaum explained that an investor director required Mr Brown to be removed as CFO.

[41] Mr Brown maintains that Mr Tenenbaum confirmed that Mr Brown would still receive his share entitlement and that he requested that this be put in writing. Mr Tenenbaum does not recall discussing anything about any “share entitlement”.

[42] On 7 and 10 March 2023 Mr Brown met with Mr Tenenbaum to discuss his handover. He maintains that he once again raised his share entitlement. He says Mr Tenenbaum promised he was going to get the Board to grant the shares but that he refused to put this in writing.

[43] On 14 and 17 March 2023 Mr Brown and Mr Tenenbaum met again to discuss handover responsibilities. Mr Brown claims that Mr Tenenbaum agreed he would put his share entitlement in writing for Mr Brown to consider.

[44] On 20 and 21 March 2023 there were Slack messages between Mr Brown and Mr Tenenbaum where Mr Brown refers to “waiting for the offer letter” and writes “last week when we met, you said you would send me an offer for how many shares you would give me”.

[45] On 3 April 2023 Mr Tenenbaum emailed Mr Brown and discussed recognising Mr Brown’s service to TCHL by granting a 0.125 per cent share equivalent in employee options that are fully vested.

[46] Mr Tenenbaum maintains that if Mr Brown wanted to acquire 0.125 per cent of the shares in TCHL at today’s date, it would be the equivalent of acquiring 17,721 shares at a price of US\$2.96 per share or \$52,454.16, which is more than any investor has been prepared to pay to acquire shares since 2021. Under the terms of the draft ESOP, the option for shares needed to be exercised within three months of them being offered, or the Board could elect to cancel them.

## Framework for analysis

[47] The Act defines an “employee” as follows:

### 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
  - (b) includes—
    - (i) a homemaker; or
    - (ii) a person intending to work; but
- ...
- (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.
- ...

[48] The Supreme Court’s decision in *Bryson v Three Foot Six Ltd* remains the authoritative decision in approaching an assessment of “all relevant matters” under s 6(3)(a).<sup>1</sup> It defines “all relevant matters” as including:<sup>2</sup>

[32] “All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. ... “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. ...

[49] The Court of Appeal in *Rasier Operations BV v E Tū Inc* considered *Bryson* in the context of a s 6 claim brought by rideshare drivers.<sup>3</sup> The Court of Appeal distilled the *Bryson* approach into a two-stage inquiry:<sup>4</sup>

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<sup>1</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

<sup>2</sup> At [32].

<sup>3</sup> *Rasier Operations BV v E Tū Inc* [2024] NZCA 403, (2024) 20 NZELR 813.

<sup>4</sup> At [97].

- (a) The first stage involves identifying the substance of the parties' mutual rights and obligations as a matter of reality, by considering:<sup>5</sup>
- (i) the written and oral terms of the contract between the parties, with the focus being on the parties' mutual obligations, interpreted objectively, rather than on any labels ascribed to the relationship;
  - (ii) how those terms have been implemented in practice;
  - (iii) the parties' common intention about the substance of their mutual rights and obligations, with any subjective intentions of either party not being relevant;<sup>6</sup>
  - (iv) any relevant industry practice.
- (b) The second stage involves determining whether the rights and obligations identified at the first stage amount to a contract of service. The criteria for that assessment are the common law tests: the control test, the integration test, and the fundamental test.<sup>7</sup>

### **Stage one: the parties' rights and obligations**

#### *The parties' agreement*

##### The pre-existing contractor agreement

[50] The logical starting point for any objective assessment of the parties' mutual obligations is to analyse the agreement between Mr Brown and TCHL.

[51] However, Mr McGoldrick, counsel for TCHL, submitted that the starting point should be the contractor agreement between TCHL and Surestart. In support of that submission, he noted that Surestart continued to render invoices for Mr Brown's

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<sup>5</sup> At [97], [98](a) and [143]–[219].

<sup>6</sup> At [106]–[114] and [209]–[216].

<sup>7</sup> At [97], [98](b) and [220].

services. He acknowledged that the contractor agreement had lapsed in February 2022 but said that the parties had extended the agreement, even if it was without turning their minds to the issue.

[52] On the other hand, Mr Kilkelly, counsel for Mr Brown, submitted that a fresh agreement was reached in April 2022 and it commenced on 1 June 2022. He submitted that there were a number of divergences between the contracting agreement prior to 1 June 2022 and the situation after that date. In particular, he noted that the following changes were made after 1 June 2022: Mr Brown received annual holidays and sick pay, Mr Huang was no longer permitted to be engaged, the rate of payment was amended, and no summary of hours worked was provided. He also noted that no written variation to the contracting arrangement was recorded.

[53] I am not persuaded by Mr McGoldrick's submission that the verbal agreement for Mr Brown to work for TCHL on a full-time basis was an oral variation of the written independent contractor agreement. As acknowledged by Mr McGoldrick, the agreement between TCHL and Surestart lapsed in February 2022. The parties clearly continued on the basis of that contract up until the end of May 2022, but I find that there was a clear break from 1 June 2022 when Mr Brown started his full-time role on new terms such that any implicit or explicit continuance of the previous agreement was set aside.

[54] Clause 16.1 of the written agreement required any variations to the agreement to be recorded in writing. An oral variation would be a clear breach of that clause. Further, although the terms of the verbal agreement are discussed in more detail below, I note that they fundamentally changed the nature of the written agreement. It changed the hours worked by Mr Brown from being on demand and variable to 50 hours per week. The consideration was reduced to one-third of the rate Surestart had previously been charging TCHL for Mr Brown's work and capped at a fixed rate. The verbal agreement also limited the work to be carried out by Mr Huang.

[55] In relation to Mr Brown continuing to render invoices through Surestart on a monthly basis, both Mr Brown and Mr Tenenbaum indicated in correspondence with Ms Nguyen that Mr Brown would continue sending invoices until a written agreement

had been completed. That correspondence indicates that the parties had reached a new agreement verbally but that it still needed to be formalised in writing. The continuing invoicing arrangement was merely a placeholder prior to that formalisation of the agreement. Therefore, I find the invoices by themselves do not indicate that the original contracting agreement was still in place.

The terms of the verbal agreement

[56] As the contracting agreement was no longer in force, the agreement between the parties was not recorded in writing. The parties dispute not only the terms of their agreement, but also how the agreement was reached. Ascertaining the terms of the verbal agreement is a question of fact. Evidence which will assist with this task is admissible, including evidence of the parties' subjective intentions and subsequent conduct.<sup>8</sup>

[57] The evidence before the Court indicates that the parties met to discuss Mr Brown's future with TCHL at least on 24 October 2021, 12 and 24 November 2021, and 14 April 2022. The evidence from Mr Brown and Mr Tenenbaum was broadly consistent about what was agreed at those meetings; however, each party sought to characterise the items agreed in different ways.

[58] Both parties agreed that Mr Brown was offered and accepted a full-time CFO position with TCHL starting on 1 June 2022, and reporting to Mr Tenenbaum. Both parties agreed that Mr Brown would be paid \$200,000 per year by way of remuneration. Mr Brown described that as a salary, whereas Mr Tenenbaum described it as compensation of \$95 per hour, working out to approximately \$200,000 per year. Both parties also accept that Mr Brown became eligible for sick leave and annual holidays, which Mr Brown was not previously entitled to under his contracting agreement.

[59] Both parties gave evidence about Mr Brown's relationship with Surestart and Mr Huang under the parties' agreement. Mr Tenenbaum agreed at the hearing that

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<sup>8</sup> *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at [65]–[67]; and *Bryson*, above n 1, at [20].

from 1 June 2022, TCHL no longer required Mr Huang's services and that Mr Brown was expected to perform work himself. That evidence is consistent with Mr Huang's actual involvement. The work he performed in June 2022 was related to work he had performed before Mr Brown's new arrangement began, and the work he performed in November 2022 was limited, of a sensitive nature, and not invoiced to TCHL as had occurred previously. Therefore, I find that from 1 June 2022, Mr Huang was not part of any agreement between the parties and that there was no longer any opportunity for Mr Brown to subcontract under the new agreement.

[60] I also accept Mr Brown's evidence that the parties agreed he would wind Surestart down but that he could continue to support customers after 1 June 2022. His evidence was confirmed by emails he sent to his clients at the time, and given that Mr Tenenbaum could not remember what was agreed, there is no reason to doubt Mr Brown's evidence on the point.

[61] However, the parties disagree on whether they agreed Mr Brown would be an employee and whether he would be entitled to shareholding in TCHL. The dispute over whether the parties intended the relationship to be an employment relationship or a contractor relationship overlaps with what the parties intended, so I consider that issue under that heading.

[62] In terms of the share agreement, Mr Brown considered that he was entitled to a two per cent shareholding in TCHL. Mr Tenenbaum accepted that he told Mr Brown that TCHL might agree to complement his reduced hourly rate with share options, but he said that was subject to Board approval and that he would never have offered Mr Brown a two per cent shareholding. On the other hand, while being cross-examined, he accepted that Mr Brown thought he was going to obtain shareholding in TCHL as part of their agreement. He stated that he did nothing to dissuade Mr Brown from that view.

[63] For the purposes of this decision, which only needs to consider whether Mr Brown was an employee, it is not strictly necessary to resolve whether the parties agreed that Mr Brown would receive a shareholding in TCHL or how large such a shareholding would be. However, I find that, at the very least, the parties discussed

the idea of Mr Brown owning shares in TCHL to complement his remuneration and that he was induced to join TCHL at least partially as a result of those discussions.

[64] Further, I note for completeness that I do not consider TCHL's claim to be credible that Mr Brown would agree to shut down Surestart, a business which was receiving fees in excess of \$350,000 per year, in return for working fulltime for TCHL for a substantially reduced annual fee of \$200,000. It is more credible that Mr Brown agreed to such a reduction so that he could benefit from the rights and protections afforded to employees under the law and from TCHL's ESOP which was being dangled in front of him.

*Did the parties have a common intention concerning an employment relationship?*

[65] The Court of Appeal in *Rasier* observed that there has been an "inappropriate" focus on the subjective intention of the parties in some cases.<sup>9</sup> While section 6(3)(a) expressly refers to "any matters that indicate the intention of the persons", this does not license an inquiry into the individual circumstances of a particular worker and the level of understanding they may or may not be expected to have as a result of their background.<sup>10</sup> Rather, what is relevant is the common intention about the substance of their mutual rights and obligations, viewed realistically, which can be objectively obtained from their dealings.<sup>11</sup>

[66] In *Rasier*, the Court of Appeal did not consider that labels were of any assistance and noted that the only indications of the parties' intentions arose implicitly from the objectively ascertained rights and obligations of the parties and the realities of the relationship.<sup>12</sup> As a result, the parties' intentions in that case could only be objectively derived by applying the common law tests. But as noted by the Court of Appeal, that analysis runs into the second stage of the test.<sup>13</sup> Therefore, to avoid repetition, it is unnecessary to set out that analysis here.

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<sup>9</sup> *Rasier*, above n 3, at [106]–[107].

<sup>10</sup> At [106].

<sup>11</sup> At [108] and [114].

<sup>12</sup> At [217].

<sup>13</sup> At [218]–[219].

[67] I accept that the presence of labels is not determinative of the ultimate issue.<sup>14</sup> However, where the parties are relatively sophisticated, their intention concerning the label to be used for their relationship can be relevant. On this point, the Court of Appeal held in *Rasier*:<sup>15</sup>

Where an agreement has been negotiated between a worker and a principal, each of whom has access to legal advice and a meaningful opportunity to engage on what the terms of their relationship should be, it may be appropriate to give some weight (albeit not determinative weight) to statements in the agreement about what sort of relationship they intend to commit to.

[68] This is particularly true in the present case where TCHL has submitted that the parties intentionally established a contractor arrangement to avoid tax liabilities.<sup>16</sup>

[69] Mr Tenenbaum and Mr Brown gave inconsistent evidence about whether they described the relationship as an employment relationship or as an independent contractor relationship. Mr McGoldrick submitted that Mr Brown continued as a virtual CFO and that he became a full-time freelancer after 1 June 2022. Mr Kilkelly submitted that those terms are conspicuously absent from the documents during the period between April 2022 and March 2023.

[70] I consider the evidence of the subsequent conduct of the parties overwhelmingly supports Mr Brown's claims that the parties intended for their agreement to be an employment agreement. The evidence includes the following:

- (a) Mr Brown informed Mr Huang that TCHL had offered him employment as the full-time CFO of TCHL. He then proceeded to wind down Surestart's business, handing over clients to Mr Huang and other financial advisors, and declining new client opportunities.
- (b) Although the parties never signed a new agreement, Mr Brown and Ms Nyugen, in correspondence with Mr Tenenbaum, repeatedly refer to the preparation of an employment agreement. Mr Brown and Mr Tenenbaum continued to discuss the terms of an ESOP that could apply

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<sup>14</sup> Employment Relations Act 2000, s 6(3)(b).

<sup>15</sup> *Rasier*, above n 3, at [111].

<sup>16</sup> See below at [94]–[97].

to him. I accept Mr Brown's evidence that during a weekly catchup meeting with Mr Tenenbaum on 23 June 2022 he was led to believe that TCHL's lawyer was working on his employment agreement. While Mr Tenenbaum does not recall this discussion, Mr Brown does, and he has produced notes that he made during the meeting which he says are consistent with his recollection. Further, Mr Brown's email to Mr Tenenbaum on 19 September 2022 set out what Mr Brown understood to be the terms of his employment and expressly requested that Mr Tenenbaum have TCHL's lawyers put those terms into an employment agreement. Mr Tenenbaum did not respond to that email and, as noted previously, I do not consider that he advised Mr Brown that they were misaligned over the email.

- (c) Following 1 June 2022 Mr Brown's description was changed from freelancer to employee in TCHL's staff spreadsheet.
- (d) Following 1 June 2022 Mr Brown was entitled to and took annual holidays and sick leave and was paid for public holidays that he did not work.
- (e) Following 1 June 2022 Mr Brown was able to claim reimbursement for his expenses from TCHL.

[71] There is also evidence which might suggest that the parties intended to continue their contracting relationship; however, that evidence is equivocal in comparison to the evidence summarised above. Although Mr Brown continued to submit invoices and, as a result, manage his tax liability, this was a temporary measure pending the finalisation of an employment agreement. Mr Huang performed some work, but as noted above, the nature of that work changed after 1 June 2022. The parties agreed that he would continue using his own devices, which makes sense given that he already had devices that he had been using and was willing to continue using, and he was reimbursed subsequently for a computer screen that he bought while engaged by TCHL. Finally, he continued to work for Surestart clients after 1 June

2022; however, that was a pragmatic arrangement made to accommodate Mr Brown's transition to TCHL.

[72] Ultimately, a reasonable person, having regard to the terms of the relationship and the subsequent conduct of the parties, would have considered that the parties had a common intention to be in an employment relationship from 1 June 2022. As this case did not involve a 'take it or leave it' negotiation, it is appropriate for some weight to be given to the sort of relationship to which the parties intended to commit.

*There is no relevant industry practice*

[73] There was no evidence before the Court as to whether it is industry practice for CFOs to be engaged as employees. The fact that Mr Brown was an independent contractor while working as a part-time virtual CFO, and that he provides such services, more broadly indicates that it is possible for a CFO to be a contractor. But that, by itself, does not indicate anything significant given that there may be differences in practice for full-time CFOs and part-time CFOs. In the absence of further evidence, no weight can be placed on the issue.

**Stage two: the common law tests**

[74] I now turn to the second stage of the inquiry, the application of the longstanding common law tests for classification of contracts as contracts of service – the control, integration and fundamental tests – in order to ascertain whether the parties' relationship amounts to an employment relationship.

[75] The control test assesses the degree of control the employer or principal exerts over the work an employee or contractor is to do and the manner in which it is to be done. The greater the extent to which the principal or employer can specify work content, hours and methods and can supervise and regulate a person, the more likely it is the person is an employee.<sup>17</sup>

[76] The Court of Appeal in *Rasier* observed that the reasons for control are irrelevant – it is the nature and extent of control that matters when determining the

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<sup>17</sup> *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 699–700.

nature of the relationship, not the regulatory or commercial reasons for exercising that control.<sup>18</sup>

[77] Mr Kilkelly submitted, and Mr McGoldrick accepted, that the control test must be applied within the context of Mr Brown being a senior worker with extensive experience and knowledge about financial matters. In that context, I note that Mr Brown occupied an executive level position in TCHL as the company's CFO. As such, he had the autonomy a senior employee of this kind could be expected to have in the day-to-day performance of his duties. In effect, while reporting to Mr Tenenbaum, he was capable of completing tasks without supervision.

[78] He appeared to come and go from TCHL's offices and worked from home at his discretion. He was able to continue using his personal computer and mobile phone and continued to use Excel spreadsheets and his personal Dropbox account. These were features of Mr Brown's work prior to 1 June 2022.

[79] The changes in control from 1 June 2022 included:

- (a) Mr Brown increased his weekly hours of work for TCHL from five hours to 50 hours.
- (b) Mr Brown was no longer able to delegate tasks to Mr Huang.
- (c) Mr Brown was expected to be available to attend meetings with overseas staff from 6 am to 10 pm.
- (d) When Mr Brown took annual holidays, he was contacted by TCHL and required to perform work while on holiday.

[80] On balance, the above factors point towards there being an employment relationship.

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<sup>18</sup> *Rasier*, above n 3, at [223].

[81] I turn to the integration test. This test assesses the extent to which an individual is “part and parcel” of, or integrated into, the organisation.<sup>19</sup>

[82] Mr Kilkelly submitted that Mr Brown was integrated into the business in almost every conceivable way: he appeared in TCHL’s organisation chart; he was listed as a full-time employee on TCHL’s internal staff list; TCHL’s promotional materials and other external documents featured him as its CFO; he attended events in his capacity as CFO for TCHL; he worked most days from TCHL’s offices and was provided with access to a carpark; he worked business hours and was expected to be available outside of business hours for meetings; he had a TCHL email address; and he had accounts with the TCHL’s record-keeping software and messaging system.

[83] TCHL claims that Mr Brown was only integrated to the extent that was necessary for him to perform the services which he was supplying through Surestart. It notes that many of the indicators of integration continued from when he had been working for TCHL as a contractor on a part-time basis prior to 1 June 2022. TCHL also notes that Mr Brown did not have access to its credit cards or authorisation rights on its bank accounts.

[84] I accept that Mr Brown was already partially integrated into TCHL’s operations prior to 1 June 2022 and that some of the indicators of integration raised by Mr Kilkelly were not new. However, the role of the Court is to assess the degree to which Mr Brown was integrated as from 1 June 2022 and then to assess whether that degree of integration is indicative of an employment relationship. The fact that he was already integrated to some degree does not count against his claim.

[85] Further, TCHL’s position does not address the glaring change on 1 June 2022. Prior to 1 June 2022, Mr Brown provided TCHL with virtual CFO services on a part-time basis, working on average five hours per week, while he worked for Surestart’s other clients during the rest of his time. From 1 June 2022 this changed; Mr Brown began to work 50 hours per week for TCHL, primarily from its offices. TCHL held out Mr Brown as its CFO in its business plan and pitch deck which were used to attract investors. From this date he was also recorded in TCHL’s records as an employee,

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<sup>19</sup> *Rasier*, above n 3, at [224].

provided with employee benefits such as paid holidays and leave, and could claim reimbursement of expenses.

[86] In respect of the fact that Mr Brown did not have access to TCHL's credit cards and authorisation rights, I accept that is a factor in favour of TCHL's case. However, it is clearly outweighed by the other factors identified by Mr Kilkelly.

[87] On balance, a reasonable person who came into contact with Mr Brown in the course of his work for TCHL would have considered him to be integrated fully into its operations.

[88] Finally, I turn to apply the fundamental test, which considers whether Mr Brown was engaged to perform services as a person in business on his own account, or whether he was employed in TCHL's business.<sup>20</sup> In making that assessment, relevant factors include whether the claimant provided their own equipment, whether they hired their own helpers, whether they undertook financial risk, whether they undertook responsibility for investment and management, and whether they had an opportunity to profit from sound management in the performance of their task.<sup>21</sup>

[89] TCHL's submissions sought to place weight on the fact that Mr Brown continued to work for Surestart clients after 1 June 2022, continued to invoice TCHL for his services, continued to use his personal computer and mobile phone, and continued to engage Mr Huang as a subcontractor.

[90] In relation to Mr Brown's continued work for his Surestart clients, as noted above, he understood that TCHL had agreed to him winding down Surestart and completing transition work in the first few months of his employment. On this type of situation, the Court of Appeal held in *Rasier*:<sup>22</sup>

The fact that a person who works for business X also spends some time working as an employee for business Y, or carries on another business on their own account at times when they are not working for business X, is not a helpful indication of their relationship with business X. ... it is not possible to reach any reliable conclusion about the basis on which a person works for

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<sup>20</sup> *Rasier*, above n 3, at [134].

<sup>21</sup> *TNT*, above n 17, at 697.

<sup>22</sup> *Rasier*, above n 3, at [233].

business X by reference to their employment status when engaged in work for others, in the same or different fields.

[91] In light of the Court of Appeal's decision, I do not consider that Mr Brown's limited ongoing work for Surestart clients is in any way inconsistent with him being an employee. Further, as he was working around 50 hours per week for TCHL, he was not in a position to work for other clients in any kind of extensive manner, so his ability to do so does not give a reliable indication of the type of agreement entered into.<sup>23</sup>

[92] Mr Brown sent invoices at the request of TCHL, which he understood to be a temporary arrangement until an employment agreement was signed between the parties. He communicated this belief to TCHL, and it did not correct his view. Mr Brown also communicated his belief that the provision of his personal equipment was an agreed term of his employment with TCHL. Once again TCHL did nothing to correct his belief. In any case, as noted by the Court of Appeal in *Rasier*, the pieces of equipment provided by Mr Brown were items owned by many people for personal and household use.<sup>24</sup> Further, he did not provide all of his equipment given that TCHL reimbursed him for the purchase of a computer screen.

[93] Mr Brown admits that he personally engaged Mr Huang to work on TCHL's accounts after 1 June 2022. However, as set out above, the work Mr Huang performed in June 2022 was related to work he had done before the new arrangement began, and the work he performed in November 2022 was limited, of a sensitive nature, and not invoiced to TCHL as had occurred previously. While this explanation may raise questions as to whether this was an appropriate matter to withhold from TCHL, it explains Mr Brown's conduct in the context of an assessment of the fundamental test. Ultimately, as set out above, there was no opportunity for Mr Brown to subcontract or hire his own helpers under the agreement.

[94] TCHL's strongest submission is on Mr Brown's tax and financial arrangements after 1 June 2022. Mr McGoldrick submits that Mr Brown had the full benefit of a contractor arrangement. It points to him sending invoices from Surestart to TCHL for

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<sup>23</sup> At [105].

<sup>24</sup> At [232].

his services, through which he was able to offset Surestart's GST expenditure on its expenses against the GST collected on his income. Using his skills and experience as an accountant, he split the income he received between Surestart and himself personally to minimise the tax paid, which was an overall benefit to him. TCHL pointed to Surestart and Mr Brown being able to profit from this arrangement.

[95] TCHL relied on the Employment Court's decision in *Chief of Defence Force v Ross-Taylor*.<sup>25</sup> The Court noted that previous authorities have held that the law does not permit individuals to game the system by first claiming that they are an independent contractor to obtain tax advantages and then claiming that they are employed to obtain compensation.<sup>26</sup> Further, it held:<sup>27</sup>

It is a very serious matter for the Authority or the court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of their relationship was completely different.

[96] Mr McGoldrick submitted that Mr Brown has had the benefit of tax advantages as a contractor for a lengthy period and that it would be unjust for him to obtain those advantages and now seek to deny that he is a contractor so he can seek compensation and the benefits and protection of being an employee. His submission was that Mr Brown made his bed as a contractor and that he must now lie in it.

[97] However, I do not consider that the Court's observations in *Ross-Taylor* are relevant to the present case. I have found previously in this decision that the parties intended to enter into an employment agreement, so this is not a situation where they had a clear intention of entering into an independent contractor relationship to avoid tax liabilities. Further, the impetus for the invoicing arrangement was TCHL's insistence that invoices be submitted. If Mr Brown wanted to be paid, he had to send invoices. Once he received payment for those invoices, he responsibly filed tax returns in a presumably lawful manner. Given that TCHL required him to continue submitting invoices, it cannot reasonably fault him for arranging his tax liability in a self-

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<sup>25</sup> *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61.

<sup>26</sup> At [28]–[29].

<sup>27</sup> At [30]; but see *Rasier*, above n 3, at [111].

interested manner. Any repercussions from Mr Brown's earnings being incorrectly taxed as a result of this or subsequent judgments can be dealt with by Mr Brown in a similarly responsible way.

[98] Ultimately, Mr Brown worked fulltime for TCHL. He had no practical or realistic opportunity to grow Surestart by providing services elsewhere or by subcontracting. He had no opportunity to increase his monthly earnings with TCHL by working in excess of 50 hours per week; no amount of sound management, excellence in performance, or efficiency could change the amount he would earn. Further, he did not carry any of the risk that a contractor would normally carry. He was able to claim expenses, and if he was unable to work due to sickness or planned leave, he was able to make use of accrued annual holidays and sick leave.

[99] Therefore, I conclude that Mr Brown was not engaged as a person in business on his own account.

### *Conclusion*

[100] The control, integration and fundamental tests all indicate that Mr Brown and TCHL were in an employment relationship from 1 June 2022 to 31 March 2023.

### **Outcome**

[101] Mr Brown's application is successful. I declare that he was an employee of TCHL between 1 June 2022 and 31 March 2023 for the purposes of s 6 of the Act.

[102] Costs are reserved. If the parties are unable to agree on the issue, Mr Brown will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with TCHL having a further 14 days within which to respond. Any reply should be filed within a further seven days.

M S King  
Judge

Judgment signed at 4.15 pm on 17 March 2025