

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 277
3185739

BETWEEN HENRI COLLAINE
Applicant

AND KIRIL LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Alex Kersjes, advocate for the Applicant
Kiril Kirilov, representing the Respondent

Investigation Meeting: On the papers

Submissions received: 4 April 2023 from the Applicant
16 April 2023 from the Respondent

Determination: 30 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Henri Collaine commenced work with Kiril Limited in January 2022 as an apprentice with an apprenticeship training agreement entered into for the New Zealand Certificate in Carpentry (NZC Carpentry) later in January 2022. His engagement ended in July 2022 in circumstances that he claims amount to an unjustified dismissal.

[2] Kiril Limited's response is that Mr Collaine's working arrangement was as a self-employed labour only contractor, so the ending of the engagement cannot amount to an unjustified dismissal. Kiril Limited's response was provided by Kiril Kirilov, who is the sole director and shareholder of Kiril Limited. In this determination I have referred to Mr Kirilov when he was expressing personal views or providing evidence

on behalf of Kiril Limited, though there was no suggestion that the relationship described was anything other than between Mr Collaine and Kiril Limited.

[3] For the purposes of this determination, which addresses a preliminary matter only, other aspects of the Mr Collaine's employment relationship problem and Kiril Limited's response which are not relevant to the preliminary determination are not addressed.

The Authority's investigation

[4] The Authority directed that the preliminary issue addressed in this determination should be investigated and determined on the papers, based on the Statement of Problem, Statement in Reply, the parties' submissions and supporting documentation. This direction was given noting that should it be determined that Mr Collaine was an independent contractor, that would be the end of the matter in the Authority. Should it be determined, however, that Mr Collaine was an employee, then further investigation would be required.¹

[5] The preliminary matter addressed in this determination was allocated to me for investigation and determination under clause 2 of Schedule 2 of the Act, which allows for a change in the member constituting the Authority.

[6] Submissions were received on behalf of Mr Collaine and from Kiril Limited. I have also considered the Statement of Problem, Statement in Reply and supporting documentation.

[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.

Preliminary issue: Was Mr Collaine an employee?

[8] The issue requiring investigation and determination is whether Mr Collaine was an employee or an independent contractor when working for Kiril Limited.

¹ Direction of the Authority by Member Robinson, 17 February 2023.

[9] I need to determine whether Mr Collaine was an employee, applying the test in s 6 of the Act, the relevant provisions for this determination of which are set out below:

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. ...

[10] 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 judgement in *Bryson v Three Foot Six Ltd*, which stated:²

“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.

What was the intention of Mr Collaine and Kiril Limited?

[11] Mr Collaine’s evidence was that he started work for Kiril Limited on 12 January 2022 under an arrangement where he would be an apprentice, but in circumstances

² *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32].

where he understood that Mr Kirilov “wanted to see how I worked before calling BCITO, the apprenticeship programme.” Mr Collaine was not provided an employment agreement and says he was instructed by Mr Kiril on what his tax code would be, to include on his tax form. Mr Collaine said “I thought that I was being employed by Kiril, I did not know that an apprentice could be self-employed as you need to be supervised.”

[12] Mr Collaine entered into an apprenticeship training agreement for NZC Carpentry with Kiril Limited on 26 January 2022, with the agreement signed by Mr Kirilov on behalf of Kiril Limited and a BCITO representative. This agreement showed that he would have been 22 years old at the time and had some previous experience in the building industry, which appears to have been as a labourer. The employment arrangement circled on the agreement was “Labour only”. The timing for this agreement reflects Mr Collaine’s evidence that “I expected I would have to prove myself for about three months, so I was surprised and excited when Kiril said he would call BCITO a few weeks later.”

[13] Mr Kirilov’s evidence has been consistent throughout his engagement on this matter that Mr Collaine was not his employee and that he worked for Kiril Limited as a self-employed labour only contractor. He pointed to a range of evidence for this being his intention, including:

- a. an advertisement which referred to the “Job contract – Self-employed Permanent Individual Labour Only Contract – WT tax” and “ Job Type: Full-time, Permanent Contract for Self-employed workers”;
- b. payslips which included as the occupation “SELFEMPLOYED [sic] – LABOUR ONLY CONTRACT”;
- c. an IR330C tax form filled out by Mr Collaine which is headed “Tax rate notification for contractors” where the selected tax rate “8” was for “Contracts wholly or substantially for labour only in the building industry”; and
- d. the apprenticeship training agreement referred to in paragraph [12] above.

[14] Mr Kirilov most clearly expressed his intentions (on behalf of Kiril Limited) in his submissions where he stated:

I have employed workers before in my company and found this is a very difficult and inconvenient process in relation to the management, paperwork, and pretensions of the bad workers.

Since 2017, I have been using the option for Labor only contractors.

It had been created by the Government for easy management of the workforce used in the construction industry.

[15] Mr Kirilov explained the absence of a written agreement with Mr Collaine with the following statement:

In practice, I never ever heard some of my known colleagues to ask the Labor only contractors in his company to sign a contract.

Also, I as a Labor only contractor have never ever been asked to sign a contract related to my position as a Labor only contractor or a Tax code declaration to clarify this circumstance at all.

All is defined by “word of mouth”.

The engagement is by “word of mouth”, “your rate is \$30” for example and that is all.

[16] Mr Kirilov also commented that the pay rate for Mr Collaine reflected a contracting relationship, stating:

Mr. Collaine arrived on Site and was happy with the payment of \$27 per hour.

I expanded the reason for this to him and he agreed without any questions.

The reason for this is that he has not any relevant experience and has not any tools.

He arrived with one apron without any proper tools like knife, nail punch, chisel, ruler, tape measure etc.

Also, usually in the industry people like this person are hired for laboring task on Site on minimum wage, which was \$21, if they are Employed because they are paid for annual leave, Kiwi Saver, Public holidays, ACC.

The advertisement says, “Job contract – Self-employed Individual Labor only Contract – WT Tax”.

This means as Self-employed contractor no annual leave, no Kiwi Saver, no payment for public holidays, no ACC pay.

This is the reason the worker to be paid \$6 extra to cover these above.

In this case my obligations are to pay for his time and deduct the Taxes and pay them to IRD.

[17] I have no doubt that Mr Kirilov’s intention (on behalf of Kiril Limited) was that the nature of the relationship with Mr Collaine should be a self-employed labour only

contractor and that he took a number of steps to establish the relationship on that basis. I am not convinced, however, that Mr Collaine understood fully the tax arrangements reflected in the IR330C tax form he filled out, under Mr Kirilov's guidance, or intended that his apprenticeship arrangement not be an employment relationship. Mr Collaine may have expected there was an element of a trial to his working arrangements, but was clear that he thought he was being employed by Kiril Limited.

[18] Based on this, I find that the parties did not share a common intention as to Mr Collaine's employment status.

Was there anything in writing to indicate the terms of the relationship between the parties?

[19] The written evidence referred to in paragraphs [11] to [13] above all indicates that the relationship was labelled as a self-employed contractor. I have, however, found that the parties did not share a common intention in relation to this.

[20] I was also provided tax records which showed that Mr Collaine received payments from Kiril Limited as "Schedular payments" with "Schedular deductions" of withholding tax. While Mr Kirilov's evidence at paragraph [16] about the pay and tax arrangements was clear about why payments were made in this way, I consider it more likely than not that he instructed Mr Collaine to fill in the form reflecting Mr Kirilov's intent and do not consider that this should be taken as determinative of the nature of the relationship.

Was Mr Collaine working under the control of Mr Kirilov?

[21] Mr Collaine described the working arrangements as follows in his evidence:

Kiril would usually spend time with me in the mornings, explaining my task/s for the day, then he would leave me to it and would go to collect materials for the following day.

I would phone Kiril when I had finished what he had asked me to complete to see if there was anything else that needed to be done.

[22] In a number of places in his evidence Mr Kirilov acknowledged that Mr Collaine was working under his supervision, for example stating in response to Mr Collaine's evidence that he didn't know an apprentice could be self-employed that "The entire construction industry widely uses this option despite apprentices needing to be supervised." Mr Kirilov also provided a range of photos of work undertaken by Mr

Collaine and comments about the quality of that work, which support that the work was undertaken under Mr Kirilov's direction and supervision.

[23] While Mr Kirilov provided evidence that clearly expressed a negative view about the quality of Mr Collaine's work and the amount of re-work he says was needed, it was clear he accepted that there was an apprenticeship arrangement. The essential nature of an apprenticeship is that the apprentice learns under the supervision or control of the other party to the apprenticeship arrangement (discussed further at paragraphs [29] to [36] below). This strongly indicates an employment relationship.

Was Mr Collaine integrated into Kiril Limited's operations?

[24] Mr Collaine provided evidence that he usually worked from 8.00am to 3.00pm Monday to Friday and occasionally on Saturdays. He said he was bound to work only for Kiril Limited due to his apprenticeship programme.

[25] Kiril Limited provided wage records which generally supported this, although claimed that his contractors could "arrive on time or late. For me is important the time on site and I do records about this." Mr Kirilov also claimed that Mr Collaine "had the freedom to work where he wanted. To work on my site and how often to be at work is his personal choice, this is not "bound"." This is not consistent with Mr Collaine's evidence at paragraph [21] above, that he was allocated tasks each day by Mr Kirilov.

[26] Having reviewed the wage records and payslip provided, and taking into account the essential supervisory nature of the apprenticeship arrangements, I consider that Mr Collaine was integrated into Kiril Limited's operations. There is no suggestion he was, in practice, working separately or independently during the time he was working for Kiril Limited, and I consider it unlikely he would have been doing so based on the full-time nature of his work for Kiril Limited. This indicates an employment relationship.

Was Mr Collaine effectively working on his own account (the fundamental test)?

[27] The fundamental test examines whether a person is working on their own account or acting as a separate business entity. Indicators of a person being in business on their own account can include the ability to sub-contract work or delegate performance to others, the provision of tools and equipment, whether payment was

based on task completion rather than time worked, the presence of risk or opportunity to make profit, and who business goodwill accrues to.³

[28] While there was some limited evidence that Mr Collaine had a small number of his own hand-tools, I do not consider that any of the other indicators of a person working on their own account are present and the majority of the tools he needed to perform work under his apprenticeship were provided by Kiril Limited. This strongly indicates that the real nature of his relationship with Kiril Limited was employment.

What impact does the apprenticeship training agreement have on determining whether Mr Collaine was an employee or self-employed labour only contractor?

[29] Mr Kirilov considered that the apprenticeship training agreement supported his view that the relationship was as a self-employed labour only contractor. His evidence included the following statement:

The entire construction industry widely uses this option despite apprentices needing to be supervised.

The evidence of this is the BCITO Training Agreement.

In the EMPLOYMENT STATUS – Employment arrangement is written “Labor only”.

This means the biggest training organization in New Zealand - BCITO uses this “Employment arrangement / Labor only”, only the applicant didn’t know this circumstance.

[30] Mr Kirilov clearly placed reliance on his understanding of the apprenticeship training agreement, which was likely reinforced by references in that document to a “contracting principal” and the option for the employment arrangement to be “Labour only”, which was in fact selected in this case. I am unaware of any discussion that may have occurred between Mr Kirilov and representative of the BCITO when this agreement was signed, however, for the reasons outlined below consider that any such discussions could not have changed the nature of the relationship between Mr Collaine and Kiril Limited.

[31] The header of the apprenticeship training agreement states that “this document forms part of the Employment Agreement between the employer and the apprentice/learner.” This is reflective of the legislative underpinning for apprenticeship

³ These indicators are discussed in the context of the building industry generally in *Barry v C I Builders Limited* [2021] NZEmpC 82 at [40] to [58].

training in the Education and Training Act 2020 (ETA), emphasised by s 10 which defines an apprenticeship training agreement as follows:

apprenticeship training agreement means an agreement between an employee and their employer that relates to the employee’s receipt of, or that provides for the employee to receive, apprenticeship training

[32] The entire focus of the regulatory scheme for apprenticeship training is that the training occurs in the context of an employment relationship i.e. where the apprentice is an employee and their employer makes commitments, supported in this case by the BCITO, to ensure the employee’s “apprenticeship training leads them to attain, within a reasonable time, the level of skills necessary to complete a qualification in the skills of the specified industry” (s 376(2)(f)).

[33] This is also reinforced by the introductory section for the provisions related to vocational education and training in the ETA:

362 Training agreements and apprenticeship training agreements part of employment agreement

Training agreements and apprenticeship training agreements are part of the employment agreement between the employee and employer concerned.

[34] I have also had regard, as required by s 380 of the ETA, to the Code of Good Practice for New Zealand Apprenticeships.⁴ This Code appears to be in force, though is under review to reflect, amongst other things, the introduction of the Education and Training Act 2020.⁵

[35] The Code is clear that apprenticeships occur in the context of an employment relationship, stating:

The key components of a New Zealand Apprenticeship are:

- being employed in an industry,
- completing a relevant level 4 qualification of at least 120 credits, and
- meeting any regulatory requirements of the occupation.

⁴ Tertiary Education Commission “Code of Good Practice for New Zealand Apprenticeships” (20 August 2015) <<https://www.tec.govt.nz/assets/Publications-and-others/The-code-of-good-practice-for-new-zealand-apprenticeships.pdf>>.

⁵ Tertiary Education Commission “Consultation on Good Practice Code for New Zealand Apprenticeships” (2 November 2022) <<https://www.tec.govt.nz/vocational-education/vocational-education-news/rove-news-2/rove-news-november-2022/consultation-on-good-practice-code-for-new-zealand-apprenticeships/>>.

Every New Zealand Apprenticeship must have a training agreement. A training agreement is a formal arrangement between the employer and the apprentice and forms part of the apprentice's employment agreement.

[36] While Mr Kirilov may well have considered that the apprenticeship training agreement supported his view that apprentices could and should be self-employed labour only contractors, I do not agree. I consider that the legislative provisions and Code are clear that an apprenticeship arrangement under an apprenticeship training agreement must occur in the context of an employment relationship, which supports my finding below.

Summary of outcome on the preliminary issue: Mr Collaine was an employee of Kiril Limited

[37] For the above reasons, I find that Henri Collaine was an employee of Kiril Limited.

Next steps

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

Shane Kinley
Member of the Employment Relations Authority