Employment Court of New Zealand

Prasad v LSG Sky Chefs New Zealand [2017] NZEmpC 150 (29 November 2017)

Last Updated: 1 December 2017

IN THE EMPLOYMENT COURT AUCKLAND REGISTRY

[2017] NZEmpC 150

EMPC 253/2015

IN THE MATTER OF	an application for a declaration under s 6(5) of the Employment Relations Act 2000
BETWEEN	KAMLESH PRASAD First Plaintiff
AND	LIUTOFAGA TULAI Second Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant
AND	SOLUTIONS PERSONNEL LIMITED AND BLUE COLLAR LIMITED First and Second Third Parties

Hearing::	14-18 and 22 August 2017 (Heard at Auckland)
Court:	Chief Judge Christina Inglis Judge ME Perkins Judge KG Smith
Appearances:	P Cranney and T Oldfield, counsel for plaintiffs C Meechan QC and J Douglas, counsel for defendant P Wicks QC and E Peterson, counsel for third parties
Judgment:	29 November 2017

JUDGMENT OF THE FULL COURT

Introduction

[1] Solutions Personnel Ltd (Solutions) operated as a self-described labour hire company. It was based in Penrose, Auckland. Mr Moniem is the managing director

and shareholder of Solutions. A significant number of people were on its books, two of whom were the plaintiffs, Kamlesh Prasad and Liutofaga Tulai. Both are immigrants to New Zealand and both speak English as a second language.

[2] Solutions provided workers to a number of companies, including LSG Sky Chefs New Zealand Ltd (LSG). LSG provides in-flight catering services to airlines. It has several hundred working for it. Some are engaged on a full-time basis as employees; others are not. What is clear is that LSG relied heavily on workers sourced from agencies such as Solutions. While witnesses for LSG suggested that this reflected a need to meet seasonal fluctuations in workload, this was not supported by the evidence. Rather, over time the figures reflect a consistent pattern of hours worked, at consistently high levels.

[3] Ms Tulai signed up with Solutions in April 2009. She was given a document which purported to be an independent contractor agreement. We return to this document, the deficiencies associated with its drafting and the way in which it was presented to Ms Tulai, later. Ms Tulai commenced work with LSG in October 2009, initially washing cutlery. Ms Tulai was relatively young at the time and had a child. She worked up to 62.75 hours per week at LSG. During one period Ms Tulai worked 34 full days continuously without a break. We pause to note that counsel for LSG, Ms Meechan QC, characterised this as LSG accommodating Ms Tulai's desire for lots of work. We think it can more accurately be described as reflecting the realities of the situation Ms Tulai was in, and the financial pressure she was under. In the event Ms Tulai worked almost exclusively with LSG for around four years.

[4] Mr Prasad signed up with Solutions on 26 November 2013. He was also given a document purporting to be an independent contractor agreement. Mr Prasad went to work at LSG on 15 December 2013. He worked there as a loader for two years, on average 45 hours per week, until December 2015.

[5] It is fair to say that Ms Tulai and Mr Prasad were in a vulnerable position. They had very little appreciation of New Zealand employment law, or the documentation they were asked to sign by Solutions.

[6] Ms Tulai and Mr Prasad were paid by Solutions, which was in turn paid by LSG for the hours the plaintiffs worked. It appears that LSG believed, at least initially, that what it was paying Solutions and what Solutions was paying workers such as the plaintiffs, covered all on-costs (holiday pay and other statutory entitlements), while also incorporating a profit margin for Solutions.1 It is however clear that LSG did little to inquire into what was – or was not – being passed on by way of pay to the workers it took on from Solutions. During her time with LSG Ms Tulai was paid a sum equivalent to the minimum wage. Mr Prasad was paid slightly more.

[7] The labour hire arrangement evidently suited LSG. It meant that the company was not troubled by the usual responsibilities and liabilities associated with an employment relationship. As the contemporaneous documentation reflects, another identified spin-off benefit was that Solutions workers would be able to work through any strike action by LSG employees. More generally, LSG's enthusiasm for the arrangement is reflected in correspondence recording the way in which the relationship with Solutions had developed. It noted, amongst other things, that:2

[Mr Moniem] approached LSG Sky Chefs in 2007 offering what most temp agencies purport to provide – a win/win service that meets your expectations etc. ...

At the time we were comfortable but not thrilled with the service from our existing providers so we figured whatever. They can't be any worse, and if they are, we can drop them like hot bricks. So we gave [Mr Moniem] an order for some semi-skilled transport labour.

That was when it got interesting.

The order was filled within 24 hours. The candidates were brought to the plant personally by [Mr Moniem] and a selection process had us choosing the candidates we wanted from these pre-screened individuals. He didn't stop there – he just kept bringing them out until we cried ENOUGH!!!!!

...

A couple turned out to be no good (it happens to everyone sometimes...).

No quibbles, no drama. One phone call, and a new person arrived, ready to go.

Pricing? Sharp ...

1 For example, on 8 August 2012 Mr Moniem (in response to a query from Ms Park about the figures he had provided) advised LSG that "our charge rate does include employee costs and it will be paid to the employees supplied to LSG."

2 See "To Whom it May Concern" letter from Mr Dempsey, human resources manager, dated 29

September 2009.

[8] Despite the benefits LSG perceived in its relationship with Solutions, it is apparent that it began to harbour concerns about potential legal risk. This led to an email from Ms Park (LSG's human resources manager) in mid-2012 identifying the benefit of seeking an indemnity from Solutions in respect of any "legal issue that LSG may come across due to the contractor agreement between Solutions and [Solutions] workers," that any such issue would be "sorted and settled immediately by Solutions" and at its cost, and that it would "never reach to a level that may affect LSG reputation in business or public." During the course of evidence Ms Park sought to characterise this as being directed at Solutions managing its own risk. We do not accept that. Clearly it was about managing the potential risks thrown up by the labour hire model for LSG itself.

[9] One of LSG's particular concerns related to the longevity of some of the Solutions placements. This prompted Ms Park to request that a list of Solutions workers be compiled, with input from Mr Moniem. Mr Moniem asked Ms Park what LSG wanted Solutions to do with the listed workers. He made the point that it was possible to convert any of the workers to employee status, but that would result in PAYE costs being added to each worker's pay and this being on-charged to LSG. This was not an option that was pursued at the time.

[10] The longevity list had particular implications for Ms Tulai, as her name was towards the top of it. That is because she had, by that stage, been working for LSG for an extended period of time. On 22 October 2013 Ms Park issued the following directive:

Can you start moving some of your long servers out and replace them. At your own pace is fine as long as it is at least 1 a week.

[11] A further instruction was issued six days later, that a number of workers whose names were on the list "have to go".3

[12] By early 2014 LSG was aware that Solutions had been audited by the Labour

Inspectorate. Although having concluded that Mr Moniem was "obviously" using,

3 The instruction went on to note that that was the "last day for that person can ever work in here.

They will not [go] on the roster anymore, and they will not be called in to work at all. ... give

me the replacement as soon as you can."

or attempting to use, independent contractor status to his advantage (identified by LSG as a "loophole"), LSG decided to adopt a wait and see approach – including as to when the loophole might close. LSG's procurement manager, Mr Orton, noted in an email to the general manager, copying in Ms Park, that in the meantime the loophole was working well from LSG's perspective.

[13] By January 2015 Ms Park was in touch with Mr Moniem suggesting that, depending on the outcome of the Labour Inspector's inquiries, LSG and Solutions would need to "get together to discuss a strategy". Mr Moniem responded assuring Ms Park that his highest priority was keeping LSG happy. While not accepting that there were any problems with the current operational model, Mr Moniem subsequently took steps to set up a new company, Blue Collar Ltd (Blue Collar). Ms Tulai had already left by this stage. Mr Prasad had not. He was presented with an agreement by Blue Collar and told to sign it. Mr Prasad otherwise continued working with LSG in precisely the same way as he always had.

[14] Ms Tulai and Mr Prasad claim that they were employees and that their employer was LSG. LSG says that they were independent contractors and, if not, they were employees of Solutions. Solutions and Blue Collar say that Ms Tulai and Mr Prasad were independent contractors and, if not, they were employees of LSG.

[15] The central issue in this case, and as identified in the plaintiffs' claim, is whether Ms Tulai and Mr Prasad were employees of LSG.

[16] We pause to note that the plaintiffs did not seek to mount an argument that they were jointly employed by both LSG and Solutions/Blue Collar. When the point was put to counsel for the defendant and third parties, both Ms Meechan and Mr Wicks QC submitted that such an arrangement was not possible as joint employers could only exist within a single umbrella of related companies. We do not necessarily accept the strength of that proposition but do not need to decide the issue given the basis on which the claim was advanced and responded to by the defendant

and the third parties.4

Analysis

[17] The case for LSG was essentially mounted on the basis that the start and end point for analysis was whether there was a contractual nexus between the plaintiffs and LSG. This, it was said, required an assessment of three pillars of contract law, namely offer, acceptance and consideration. Absent clear identification of these criteria as between Ms Tulai and LSG, and Mr Prasad and LSG, there was no contractual relationship and the plaintiffs' application must fail at this fundamental hurdle. Conversely, it was said that where the existence of a contractual relationship between two parties is clear, the inquiry is directed at establishing the real nature of that relationship and, in particular, for the purposes of the Employment Relations Act

2000 (the Act), whether a contract of service existed. The full Court's judgment in

McDonald v Ontrack was said to support such an approach.5

[18] We are not drawn to this aspect of the defendant's argument. It seems to us that it has been overtaken by developments in the law, specifically in the employment sphere in New Zealand and in contract law more generally. In this regard the strict contractual approach favoured under the previous Employment Contracts Act 1991 was displaced 17 years ago by the enactment of the Employment Relations Act 2000. That Act, as the name suggests, heralded in a new way of looking at contractual relationships in the workplace. It has more generally been acknowledged that a rigid offer/acceptance/consideration approach in contract law can give rise to difficulties.6

[19] The reality is that it is not uncommon for workplace relationships (to use a neutral term) to morph over time and to change their nature incrementally,7 or for

their true nature to emerge once the particular factual context is considered. It is

4 We note that joint employment, in the context of labour hire arrangements, has been considered overseas. See (for example) *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152 at [74]; *Fair Work Ombudsman v Eastern Colour Pty* [2011] FCA 803, (2011) IR 263 at [77].

5 *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223.

6 See, for example, *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] NZLR 281 at [29].

7 See *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [42].

certainly not unusual for there to be no contractual documentation, or documentation of any sort, evidencing a relationship. Nor is it unusual for documentation, when it does exist, to mask the true nature of the parties' relationship, either deliberately or inadvertently.8 And it is not uncommon for one party to have no idea about what the legal framework for the relationship is. This is particularly so in cases involving vulnerable workers.

[20] The sort of bright-line test advanced on behalf of the defendant runs the risk of obscuring the practical realities of working relationships, and focusing on form over substance. That is not an approach mandated by the Employment Relations Act, and is at odds with the underlying objectives of the legislation (including addressing inherent imbalances in bargaining power).9

[21] The full Court's decision in *Ontrack* is, as far as we are aware, the only case in New Zealand to have considered a similar claim involving what the defendant describes as a third-party end-user, or triangular, relationship. In *Ontrack* the plaintiff had entered into an individual casual employment agreement with a labour hire company, Allied. There was a contract between Allied and Ontrack for the supply of casual labour. The plaintiff was placed with Ontrack. He later claimed that at some point following his placement he had entered a contract of service with Ontrack. Ms Meechan drew particular attention to the Court's observation that:

[36] The onus is on Mr McDonald to establish the existence of a contract of service between himself and Ontrack. We agree with Mr Chemis that such a contract must satisfy the common law requirements of offer, acceptance, contractual intention, consideration, and certainty. That is consistent with the English and Australian authorities cited.

[22] While what might be described as the strict contractual approach appears to have received some endorsement from the Court in *Ontrack*, that may simply reflect the way in which the case was argued. Notably, the parties agreed that *if* there was a

contract between them it was a contract of service. That was the context in which

8 See, for example, the discussion in the ILO Report *The Employment Relationship* Report V(1), International Labour Conference, 95th Session, Geneva, 2006 at [46]-[47] in respect of the international trend towards disguised employment relationships.

9 For a recent affirmation of the differences between employment relationships and "ordinary contractual relationships" see *Brown v New Zealand Basing Ltd* [2017] NZSC 139 at [56], citing *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 [*Crofts*] at [6] and Employment Relations Act 2000, s 3(a)(i) and (ii).

the Court proceeded with its judgment and against which the above cited passage needs to be read. The present case proceeds from a different starting point. We also note that the comments that the defendant seeks to rely on in *Ontrack* were followed by an observation that the inquiry will be an intensely factual one and that each case must be determined having regard to all relevant matters. Ultimately the Court allowed Mr McDonald's claim to proceed.10

[23] It is well accepted that the nature of work and the way in which it is being undertaken is rapidly evolving, both within New Zealand and overseas.11 Labour- hire arrangements are part of this evolution. Such arrangements differ from what might be described as a traditional bi-lateral arrangement, as the following two diagrams illustrate:

Employee Employer

Diagram 1 – conventional employment relationship

Solutions

(intermediary)

Plaintiffs
(workers)

LSG (end user/host)

Diagram 2 – triangular, labour-hire relationship

[24] In a classic labour-hire arrangement the labour-hire agency (the agency) hires out the labour of a worker to another business (the host). The host pays a fee to the agency. The fee covers the cost of the worker's services, plus some profit margin for

the agency. The agency in turn remunerates the worker, who agrees to perform work

10 *McDonald v Ontrack*, above n 5, at [50], [51].

11 There is, for example, a developing trend towards outworkers (those who perform work away from a designated workplace, perhaps in their own home) and agency labour. For a discussion about such trends, and the concerns about protection of worker rights which they have given rise to in Australia, see (for example) A Stewart *Stewart's Guide to Employment Law* (5th ed, The Federation

Press, Australia, 2015) at [4.8]-[4.12].

for the host in accordance with their directions or requirements. Labour hire arrangements differ from recruitment services. The latter involves the brokering of an employment relationship, by introducing a worker to an employer or vice versa, and leaving them to form a contract. A recruitment fee is taken but there is no ongoing involvement in the relationship.12

[25] One Australian academic has described three antecedent phases in the development of labour hire arrangements:13

• *traditional "temping" agencies*, which have long specialised in the provision of workers to help client companies cope with fluctuations in demand or the temporary absence of employees, the emphasis in such an arrangement being on short-term employment;

• *recruitment agencies*, which expanded in the 1970s and 1980s when firms began to outsource their human resources functions and looked to agencies to short-list and test candidates - the client would then make a direct offer of employment to the successful candidate; and

• *the "pure" labour hire industry*, which grew in the late 1980s to replace or supplement existing employees in highly unionised and dispute-prone industries such as construction.

[26] While labour-hire as a way of organising work arrangements has become established, concerns about the protection of worker rights have prompted legislative action, and the development of guidelines, in numerous jurisdictions (although not New Zealand).14 For example, most member states of the European Union have some form of licensing or registration system for labour hire organisations. In Japan and Korea such arrangements are prohibited in certain industries where dangerous

work is involved; in other countries a statutory maximum period for an on-hire

12 Stewart at [4.8].

13 Steve O'Neill "Labour Hire: Issues and Responses" (Department of Parliamentary Services,

Australia, Research paper No 9 2003-04 March 2004) at 6.

14 See, for example, the Employment Agencies Act 1973 (UK); the Labour Hire Licensing Bill

2017 (South Australia); see also "On-Hire employee services – workplace obligations" on the

website of the Fair Work Ombudsman, Australia <www.fairwork.gov.au>.

posting with a host organisation has been implemented (see, for example, Israel, Belgium, Italy and Japan).15

[27] The central concern giving rise to such initiatives internationally appears to be the extent to which an organisation which would otherwise have employed labour directly may legitimately side-step the minimum employment standards by entering into an agreement with a third party and claiming that the workers provided under that contractual arrangement are independent contractors or employees of the labour- hire company.16 Similar concerns have been expressed in relation to supply chains. It has been said that such "... arrangements enable firms at or near the apex of the chain to avoid the legal proximity with workers that may attract various obligations and liabilities, but at the same time enable them to maintain effective commercial control over the work performed."17

[28] The ILO has implemented the Private Employment Agencies Convention

1997 (No 181), requiring member states to ensure that national law and practice provide adequate protections to employees of private employment agencies, including employers providing labour to third parties.18 New Zealand has not yet ratified ILO Convention No 181.

[29] Ms Meechan took us to a number of UK authorities19 where similar concerns to those raised on behalf of the plaintiffs have been identified and where the Court has declined to intervene, emphasising that an employment relationship cannot be created by the "mere and unilateral wish of the putative employee;"20 and that if the

sea-change in work raises concerns of social or economic policy then it is up to

15 Anthony Forsyth *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Industrial

Relations Victoria Department of Economic Development, Jobs, Transport & Resources, 31

August 2016) at 204-205.

16 See, for example, Annette Thornquist "False Self-Employment and Other Precarious Forms of

Employment in the Grey Area of the Labour Market" (2015) 31 IJCCLIR 411.

17 Richard Johnstone and others *Beyond Employment: The Legal Regulation of Work Relationships*

(Federation Press, Sydney, 2012).

18 ILO Convention 181, cl 12 provides that national laws of member states are to determine the lines of responsibility for these issues as between private employment agencies and user

enterprises (host organisations).

19 For example, *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, [2004] IRLR 358; *Muscat v Cable & Wireless plc* [2006] EWCA Civ 220; and *James v London Borough of Greenwich* [2008] EWCA Civ 35, [2008] ICR 545 at [64] per Thomas LJ.

20 *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451 at [34]; see also *James,*

above n 19, at [64] per Thomas LJ.

Parliament, not the Courts, to address it by way of legislative amendment. However, it is equally clear that the Courts have not excluded the possibility of an employment relationship with the end-user in a labour-hire context. Unsurprisingly, much will depend on the particular facts.21

[30] We do not disagree with Ms Meechan's proposition that policy setting is for Parliament. Changing patterns of work may test the elasticity of the current statutory framework. It is important not to take the ambulatory approach to statutory interpretation beyond its proper bounds. However, as s 6 of the Interpretation Act

1999 makes clear, statutes apply to circumstances as they arise. They are also to be read purposively. The Employment Relations Act is no exception. And it is that statute, not the legislative schemes applying in jurisdictions elsewhere, which applies.22

[31] We do not accept that the mere fact that the present case involves a work arrangement which differs from the traditional model, namely a self-styled labour hire arrangement with an end-user and an intermediary, means that s 6 of the Employment Relations Act has no application, or that a different analytical approach is required. It seems to us that the core question remains precisely the same, no matter how convoluted the structure of relationships or the number of intersecting links in a labour-supply chain. In the present case it is an assessment of the real nature of the relationship between each of the plaintiffs and LSG which the Court is concerned about and which may or may not lead to the conclusion that the plaintiffs were engaged under contracts of service. We see s 6 as driving the required analysis, not the common law relating to contract formation. If *Ontrack* can properly be interpreted as suggesting otherwise (and we do not consider that, when read in context, it can), then we respectfully disagree with it.

[32] We turn to s 6. It provides:

21 See, for example, *BWIU v Odco Pty Ltd* [1991] FCA 96; (1991) 99 ALR 735 (FCR); *Mason & Cox Pty Ltd v McCann* [1999] SASC 544; see also *Wilton & Cumberland v Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300, [2007] FCA 725, referring to *Dacas*, above n 19.

22 Section 230 of the Employment Rights Act 1996 (UK) defines an "employee" as an individual who has entered into or works under a contract of employment; a "contract of employment" is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

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.

...

[33] It follows, from the plain wording of s 6, that the s 6(1) inquiry (namely as to whether a person is employed to work under a contract of service) is not to be answered by asking, as the defendant would have it, whether there is a contract; if so, what its nature is; if not that is the end of the inquiry. Rather, it is (as s 6(2) makes clear) to be answered by working backwards, from an assessment of the real nature of the relationship. This, in turn, requires an assessment of a number of relevant matters, including (but not limited to) the intention of the parties.

[34] It seems to us that the defendant's focus on the formal elements of contract formation puts the cart before the horse and sits uncomfortably with the statutory imperative of considering the reality of the working relationship to determine its contractual status. We make the obvious point that if the defendant's approach was correct s 6 would begin and end with subsection (1)(a). The remaining subsections would be redundant. That cannot reflect a proper reading of the section.

[35] As the explanatory note to the Employment Relations Bill 2000 made clear, the new Bill was designed to provide a better framework for employment relations, and to recognise that the relationship was not simply a contractual, economic exchange.23 The underlying policy intent of what was to become s 6 was to "stop some employers labelling individuals as "contractors" to avoid responsibility for

employee rights such as holiday pay and minimum wages," in other words to prevent

23 Employment Relations Bill 2000 (8-1) (explanatory note) at 1.

form trumping substance.24 As Mr Cranney points out, this dovetails into the broader underlying objectives of the Act. It seems to us that the underlying policy intent of s 6 has particular relevance to arrangements such as labour hire agreements.

[36] The application of s 6 was authoritatively dealt with by the Supreme Court in *Bryson v Three Foot Six Ltd (No 2).*25 Ms Meechan strongly submitted that this was not a "Bryson case". While there are obvious differences in the facts underlying *Bryson* and the present case, the fundamental point remains the same, namely that the Court is required to assess whether the plaintiffs were in contracts of service with LSG having regard to all relevant matters. That is the approach directed by the statute.26

[37] As the Supreme Court explained in *Bryson*, "all relevant matters" include:27

• the written and oral terms of the agreement between the parties (which will usually contain indications of their common intention concerning the status of their relationship);

• any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice (described by the Court as "critical to a determination of [the relationship's] real nature");

• any features of control and integration (described as the control and integration test); and

24 Employment Relations Bill "Report of the Department of Labour to the Employment and

Accident Insurance Legislation Select Committee" (June 2000) at 21.

25 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at

[32].

26 The point was recently made in *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC

19 at [58], where it was observed that: "Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee."

27 *Bryson*, above n 25, at [32].

• any indications as to whether the contracted person has been effectively working on his/her own account (described as the fundamental test).

[38] The inquiry is intensely factual and is not always easy. In most cases there are indicia which point both ways.

[39] We pause to note two further general points which are broadly relevant. First, it is clear that labour-hire arrangements offer some distinct advantages, particularly in terms of managing the ebb and flow of operational demand within a business. More generally, it is clear that there are instances in which a worker will be keen to be engaged as an independent contractor rather than an employee. There are other occasions where the worker has little or no choice,28 and the independent contractor model is essentially imposed on a 'take it or leave it' basis. This tends to impact most on low-paid, unskilled workers. It tends to impact least on high paid, skilled workers. The distinction is self-evidently an important one. A worker engaged under a contract of service is an employee and is entitled to the suite of protections conferred by the legislation, including the Minimum Wage Act, the Employment Relations Act and the Holidays Act.29 A worker engaged under a contract for service is not. Workers outside the umbrella of legislative protection are exposed; those within it, much less so.

[40] Second, there are two principal ways in which putative employers may seek to avoid the liabilities and costs associated with employment status. The first is to build up the formalities of the written documentation, to (for example) downplay any element of control; allow the worker freedom to work for other clients; provide that payment is to be made on provision of an invoice; and that the worker is to provide their own tools and equipment. Another mechanism (which has recently been described as "a safer way to ensure that a worker is not an employee, at least as a matter of common law") is to engage their services through another entity, for

example via the practice of labour hire.[30]

28 Stewart, above n 11, at [3.12].

29. And the Labour Inspector may become involved to act on the interests of an employee in pursuing minimum rights claims, penalties and fines in respect of any breach.

30 Stewart, above n 11, at [3.14].

[41] We turn to examine the real nature of the relationship between the plaintiffs and LSG.

Stage 1 – the terms of any agreement

[42] The plaintiffs were sent to LSG under an arrangement LSG had with Solutions. There were no written agreements between the

plaintiffs and LSG. There were however agreements in place between LSG and Solutions. It seems to us that the nature of the relationship between LSG and Solutions is relevant to an understanding of the relationship each of the plaintiffs had with LSG.

[43] A proposal document between Solutions and LSG was prepared at the inception of the relationship (late 2007). While the proposal was never finalised, it nevertheless formed the basis of the relationship between the two companies as Mr Dempsey (human resources manager with LSG at the time) confirmed. Under the proposal, LSG was to provide signed timesheets on a weekly basis to Solutions; Solutions was to undertake any disciplinary action; and Solutions would invoice LSG weekly for services.

[44] A memorandum of understanding was subsequently drafted between Solutions and LSG, dated 3 September 2012. The memorandum was said to represent an agreement to "enter into a commercial service agreement ... where Solutions will supply on-demand labour ("Services") to LSG". Amongst other things the draft agreement provided (under "Pricing") that Solutions was to provide a "sign on bonus" of a $4,000 credit note to invoices and that the agreed rate for billing purposes was $16.49 per hour (Contract Rate), with the "Solutions Employee Rate" noted as $13.50 per hour (which was the minimum wage rate at the time). Under the draft memorandum Solutions was to provide LSG monthly KPI reports, although no such reports were ever produced.

[45] A vendor supply agreement followed nearly two years later. Charge out rates were set, along with the contract rate. The margin was demonstrably low. This reflected LSG's commercially motivated desire to keep Solutions to a low margin, as

Ms Park explained in evidence. The agreement set out a number of responsibilities for Solutions, including:

• providing suitably skilled and qualified workers to meet LSG orders;

• providing workers with mandatory LSG training;

• providing workers with information about their assignment;

• ensuring all workers complete all required LSG documents;

• providing stipulated safety equipment (for example, safety shoes);

• conducting pre-employment checks;

• conducting pre-employment induction;

- liaising regularly with LSG managers in relation to the management, status and performance of Solutions workers;
- informing LSG immediately of any termination and send termination paperwork within 24 hours; and

• managing the placement of any individual such that there is no risk to

LSG of de facto employment of Solutions workers.

[46] The agreement also provided that Solutions was to ensure that any worker sent to them had not worked for LSG before, that a "joint approach" was to be taken to assessing the performance of any worker, and that LSG would provide reports on matters such as attendance, compliance with policies and procedures and competency. LSG entered into a Vendor Supply Agreement with Blue Collar in April 2016, although a memorandum of understanding had been signed between the parties on 9 July 2015.

[47] Under the LSG/Solutions arrangement individuals wanting work, such as Mr Prasad and Ms Tulai, would approach Solutions, undergo an initial screening and "sign up". As part of the screening process they would undertake a skills test. The form recorded that each applicant had received and understood Solutions health and safety tips and had been informed of their obligations as an "employee of Solutions". As Mr Cranney pointed out, this statement was focussed on health and safety. And there was no direct evidence that Solutions had actually done what it said on the form it was going to do. Rather it emerged in evidence that neither plaintiff had been advised of the implications of signing *any* of the forms they were handed, that they had not been given an opportunity to seek advice and that they did not understand much of the documentation they were given. We return to this point below.

[48] Once applicants had navigated this part of the process they were sent off to LSG to attend an interview. If the interview was successful they would be told to come into work. From this point Solutions largely fell out of the picture and had very little ongoing involvement with the workers placed with LSG, other than in terms of payment.

[49] While there was no written agreement between LSG and the plaintiffs, there was a written agreement between Mr Prasad and Solutions (and later Blue Collar), and Ms Tulai and Solutions. The documentation before the Court was, however, incomplete. There was one page of a document which bears Ms Tulai's signature; and an unsigned (complete) document which Mr Prasad accepts he signed.

[50] The document between Mr Prasad and Solutions, which we accept was presented to Mr Prasad for signing without explanation or substantive opportunity for advice or consideration, is entitled "Contractor Agreement". It emphasised that Mr Prasad would be working on assignment for Solutions' clients on its behalf. The Blue Collar agreement, which Mr Moniem said Mr Prasad would have signed (although his signature does not appear on the template document before the Court), is entitled "Casual Employment Agreement" and refers to Blue Collar being the employer. It also said that:

You shall work to the best of your ability while on assignment. You are a representative of our company. While you will be under the direction and

supervision of our client, we remain your legal employer. You agree to comply with any rules and policies of our client for whom you are working on assignment. You agree to comply with all reasonable directives.

[51] The signed page of the form for Ms Tulai (although not signed by Solutions)31 confusingly refers to the process for resolving employment relationship problems and an acknowledgement that she was an independent agent and not entitled to any employee rights. Ms Tulai gave evidence that no-one from Solutions explained the forms to her, rather she was simply told to sign what she was given. That is what she did.

[52] It was entirely a matter for LSG as to whether or not it took on any worker. If the decision was positive, the worker would be placed on a roster in a particular department and the worker would be told to come in as per the roster.

[53] We pause to note that Mr Culpepper, a supervisor with LSG who gave straightforward evidence which we accept, articulated the arrangement in a way which bears some marked similarities to the 90-day trial period provisions contained within the Act, although this statutory route was not one that LSG went down when engaging workers such as the plaintiffs. In answer to questions from Mr Wicks as to the way in which LSG approached matters, Mr Culpeper said that:

A. Yes when someone, a full-timer leaves for whatever reason they leave, we always replace it with an agency worker and that way we can, rather than bring somebody from the outside as a permanent we get a bit of experience and they get to know us and how we operate and you know, sometimes you find a very good person that's very keen and attendance is good so we have a history of their work.

Q. So you spend about 12 weeks assessing them –

A. Something like that.

Q. As to whether they are suitable to then be engaged by you as employees? A. I would recommend them to the manager, yeah.

31 Indeed there is no space on the form for a signature on behalf of Solutions to be inserted.

[54] While the documentation between Solutions and the plaintiffs is part of the factual mix, we do not gain any particular insights from it32 – including having regard to the difficulties with its wording and the deficiencies in the way in which it was put to the plaintiffs for signing. Just as the way in which parties have described their relationship may be relevant but is not determinative, so too is the absence of any such description (in this case between LSG and the plaintiffs). If it were otherwise it would cut across s 6(3)(b), and would render the inquiry into the "real nature of the relationship" required by s 6(2) redundant. Again, it is not uncommon for employment relationships to lack any documentary foundation, despite the legal requirement to do so,33 and/or for parties to lack any appreciation of their legal force (particularly those in a comparable position to the plaintiffs).

[55] As became clear during the course of evidence, neither plaintiff had any real business experience or understanding of the relevant terminology or the nature or scope of the differing legal obligations affecting employees and non-employees. Neither understood what they were being asked to sign by Solutions and there was no direct evidence that any steps were taken to explain the terms of any agreement to them or explain the nature of the relationship between Solutions and each of them, and/or each of them and LSG, and/or Solutions and LSG. We were not drawn to the evidence Mr Moniem gave about such matters. Neither of the plaintiffs was advised to obtain advice or assistance. Nor was any attempt made to advise them that they may have to register for GST or be liable for Accident Compensation Corporation (ACC) levies.

[56] Mr Moniem said that a notice was hung in a prominent position in the reception area reiterating that workers would be independent contractors, but even accepting that such a notice existed and that it was drafted in such terms, the point was evidently lost on the plaintiffs. We are not satisfied that either were aware of any such notice. Both were eager for work and simply signed what was put in front

of them.

32 As the Act makes clear, the way in which parties have described their relationship may be relevant but is not determinative; see also *Jinkinson*, above n 7, at [37]; and in this case it is a document with a third party.

33 Employment Relations Act 2000, s 64.

[57] Mr Moniem may have been of the view that the plaintiffs were independent contractors (as expressed in his email to the Labour Inspector undertaking an investigation into his business model). LSG may have been of the view that the plaintiffs were employees of Solutions. The plaintiffs may not have had any real view about whether they were employees or independent contractors. But subjective views about what was intended or agreed are only relevant to the extent that they may be evidence of what, objectively discerned, was actually agreed between the parties (the relevant parties in this case being LSG and the plaintiffs).

[58] While LSG and Solutions/Blue Collar might have been on an equal footing in terms of their respective positions with one another, the plaintiffs were at a distinct disadvantage. As the Supreme Court (UK) observed in *Autoclenz Ltd v Belcher*:34

So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the

written agreement is only a part. This may be described as a purposive approach to the problem. If so I am content with that description.

[59] We do not see this statement of general principle as controversial. In the present case the agreements contain some indicators that independent contractor status was intended (at least by the drafter, Mr Moniem). However, the documentation is poorly worded and confusing. The reality is that both plaintiffs were effectively steam-rolled into signing a document which they had no real understanding of. As s 6 makes clear, the way in which the parties have described their relationship in a written agreement is not determinative. Section 3 of the Act underscores the point, providing that one of the objectives of the legislation is to address the underlying imbalance of power between employer and employee. Section 6 must be read in light of the Act's objectives.

[60] We approach the issue in the present case on the following basis. What would a reasonably informed reasonable observer take from the documentation?

34 *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] All ER 745 at [35]. In that case Autoclenz provided car-cleaning services to motor retailers and auctioneers, one of which was British Car Auctions (BCA). Twenty valeteers cleaned cars for BCA. The valeteers had a written contract with Autoclenz, describing them as self-employed independent contractors. They were nevertheless found to be in an employment relationship with Autoclenz having regard to the particular circumstances.

The absence of documentation between LSG and the plaintiffs points away from a contract of service. This tends to be reinforced by the nature and existence of documentation which exists between Solutions and the plaintiffs. However, we do not accept (given the difficulties with the way in which the documentation was drafted and presented to the plaintiffs for signing, namely without adequate explanation or opportunity for advice) that the presence of some documentation and the absence of other documentation materially assists in an assessment of how the relationship between the plaintiffs and LSG is appropriately characterised. Rather, we see it as being out of step with the real nature of the relationship as it operated in practice (which we consider next).

Stage 2 - How the relationship operated in practice

[61] As we have said, the plaintiffs signed up with Solutions and Solutions went through an initial screening process with them before they attended an interview with LSG. Once at LSG they filled out an application form for work (entitled "Application for Employment Agency and Contractor Employees"). Applicants were asked what days/shifts they would not be able to work, and whether they could work overtime; "If offered employment when could you start?" and were asked to fill in further information to enable the company to place them "in the right job", including what position they had previously held at LSG and for how long; what their preferred position at LSG would be; and what they thought they would get out of working for LSG. It was up to LSG as to whether or not it took on a particular worker. The limited input Solutions had after this point was predominantly focused on issues to do with arranging payment, under its arrangement with LSG. We return to this point below.

[62] An agency start-up/termination form was also filled in, to "set up agency personnel in our time and attendance system", together with a labour hire family declaration form. Following their interviews, each of the plaintiffs was offered work by LSG (reflected in their subsequent placement on the LSG roster) which they accepted (reflected in the fact that they turned up for work in accordance with the roster). The following evidence given by Mr Hala (an LSG supervisor), and which we accept, reinforced the point:

A. Yeah, when [Mr Prasad]'s on a roster, it's like, he's turning up every, every day of the week.

Q. He's expected to turn up the same as the other workers?

A. Yes.

[63] The plaintiffs received an induction pack and training when they started work at LSG. The induction pack contained information in relation to the company's standards and methods of operation. The plaintiffs were expected to comply with the contents of the pack and the training they received. They were also issued with a health and safety booklet, which set out obligations in relation to health and safety, and a code of practice which contained important information for "your responsibilities as a labour hire worker", and security training. Again, the plaintiffs were expected to comply with these obligations. Each of the plaintiffs received ongoing supervision from direct line managers at LSG. Ms Park tended to downplay the level of direction and control which we are satisfied (based on other evidence before the Court) was exercised in practice.

[64] It is notable that Solutions had no input into the roster, as two LSG supervisors (Mr de Bruin and Mr Hala) made clear. Rather, the roster was created solely by LSG and notified to workers (permanent LSG employees and Solutions workers) up to two weeks in advance, with LSG liaising directly with workers as necessary. The roster drew little distinction between workers such as the plaintiffs and permanent LSG employees.

[65] It was not until a particular roster had been finalised that a copy of it was forwarded to Solutions. As Mr de Bruin explained in cross examination: "... after I've approved it they would send a copy to Solutions and the roster would be posted up on the board." The way in which the roster was prepared and notified to workers points towards a contract of service with LSG.

[66] We accept that the plaintiffs, and others in their position, tended to be contacted directly by LSG if they were required for additional work. Mr Hala explained the way in which this aspect of the arrangement worked in practice. He would contact Mr Prasad directly if he wanted Mr Prasad to work. Similarly, if Mr

Prasad wanted an increase in his hours he would talk to Mr Hala to see if that could be accommodated. If Mr Prasad wanted to have some time off he would raise it with Mr Hala directly. He would then let Mr Hala know when he wanted to be put back on the roster. Solutions had no involvement in such matters. And it is notable that when Mr Prasad was absent he was not replaced by another

worker.

[67] While we accept that the level of direct contact by LSG in relation to work hours may not have reflected the way in which such matters were intended to operate, the point is that it provides an example of the situation having many of the indicia of an employment relationship between LSG and the plaintiffs.

[68] The way in which performance management issues tended to be dealt with provides another. The plaintiffs were allocated tasks by their supervisors, and the quality of their work was checked by them. It is also apparent that performance issues were generally dealt with directly by LSG. In this regard it is clear that workers could and were terminated by LSG, without referral back to Solutions, and lesser performance issues tended to be dealt with directly between LSG and the worker concerned. This is illustrated by the way in which an incident involving Ms Tulai unfolded (known as the bond store incident). While there was conflicting evidence about certain aspects of the incident (which do not need to be resolved at this preliminary stage), and the extent to which the incident may have contributed to Ms Tulai's departure from LSG remained unclear, the key point is that it was LSG which dealt with Ms Tulai over concerns about her presence in the bond store at a particular time and on a particular date. Her supervisor raised concerns directly with her and then, as Mr Culpeper explained in evidence, he asked Security to cancel her access card and took steps to ensure that Ms Tulai was not rostered again.

[69] The way in which Ms Tulai's case was dealt with provides a useful illustration of the reality of the workplace and how it operated in practice. The point was reinforced by Mr de Bruin, who referred to an incident involving another worker originally provided by Solutions. He instructed Solutions not to send the worker again. This appeared to be the approach he routinely adopted when performance issues arose.

[70] The plaintiffs were required to wear uniforms which were provided (and laundered) by LSG. We accept that there were some practical reasons for these requirements. Nevertheless, the fact that the plaintiffs wore the same uniforms as those LSG describes as employees, and there was very little to visually distinguish them from such workers, reinforces the degree of integration of the plaintiffs into the workplace.

[71] Further, each of the plaintiffs was required to obtain and maintain security clearance to enter into the LSG workplace. Again, while there were obvious operational reasons for this the level of control exercised by LSG is a factor pointing towards a contract of service. It also reinforces the view we have reached as to the personal nature of the service provided by the plaintiffs – the reality is that the process of requiring workers such as the plaintiffs to obtain clearance prior to working for LSG, and then maintaining it, undercut the opportunity for substituted labour.

[72] As Ms Tulai explained, time was recorded on a timesheet (entitled "LSG Sky Chefs – Solution Personnel Auckland Timesheet Authorisation"). The form refers to "EMPLOYEE SIGNATURE" (under which Ms Tulai signed her name) and "SUPERVISOR SIGNATURE" (under which her supervisor signed his name). The timesheets were provided to LSG's finance department which in turn extracted data from the timesheets which was then provided to Solutions.

[73] Workers such as Ms Tulai and Mr Prasad were paid by Solutions for the hours they worked at a rate agreed between Solutions and LSG. Mr Moniem said that other than advice from LSG as to the actual hours worked (which enabled payment to individual workers to be made), "[Solutions] would have little or no idea about [the workers]." We accept that is so.35

[74] The evidence established that on occasion (although not invariably) if

Solutions workers had a query about their pay they would raise it with Solutions, who would liaise with LSG. It was not uncommon for workers to ask Solutions for a

35 And subsequently Blue Collar.

copy of their pay record for particular periods. Solutions would provide such records but would charge the plaintiffs $1 each time it provided a hard copy.

[75] LSG was regularly invoiced by Solutions under their agreement. On one occasion (when LSG reduced the payment runs) Mr Moniem wrote to LSG reminding it that:

The product we sell you is a live product that needs to be feed (sic) weekly.

[76] The pattern of work for each of the plaintiffs, and its duration, is relevant. Both worked for LSG for long hours per week on a regular basis for a lengthy period of time. There is evidence that Mr Prasad picked up limited additional work for another company on one occasion during his time with LSG; Ms Tulai worked exclusively for LSG for around four years.

[77] As emerges from the evidence, two factors operated in tandem – LSG provided both plaintiffs with a regular stream of work, which they expected and which LSG expected them to be available to perform; and there was continuity of the relationship over an extended period of time. Both factors, individually and together, point towards a contract of service.

Stage 3 – features of control and integration

[78] The plaintiffs were integrated into LSG's business. They worked alongside LSG employees doing precisely the same work, in precisely the same way, and wearing precisely the same uniforms. The only distinction, which was not a visible one, was that they were paid less. Mr Prasad gave evidence that he attended the same meetings as LSG employees. This evidence was echoed by Ms Tulai's experience in the LSG workplace. Mr Prasad gave evidence, which we accept, that if he wanted time off he discussed that with LSG, and

arranged it with his supervisor there, although later filled in a form with Blue Collar.

[79] It is clear that LSG exercised a significant degree of control over both plaintiffs in terms of when and how they carried out their work. We have touched on much of this evidence already, in considering the way in which the relationship

operated in practice, and it does not need to be repeated. Conversely it is clear that neither plaintiff had any significant ongoing engagement with Solutions – Ms Tulai said that she essentially had no contact with Solutions from 2009 to 2014; Mr Prasad's evidence was to similar effect.

[80] In summary it can fairly be said that neither plaintiff operated with any degree of autonomy. Rather LSG exercised a significant degree of direction and control over the plaintiffs' day-to-day work – what, when, where, how and by whom. However the arrangement was *intended* to work, the reality was that no-one seriously expected either plaintiff to refuse work; choose whether or not to turn up in accordance with the roster; or that slotting in a substitute would or could occur. As was pointed out in *Protectacoat Firthglow Ltd v Szilagyi* (cited with apparent approval by the Court in *Autoclenz*):36

The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by.

[81] Ms Meechan submitted that the context of the workplace was relevant to an assessment of the features of direction and control, namely the security-laden nature of the environment and the need for the work to be conducted in a highly regulated manner. We understood her to be suggesting that in these circumstances the degree of direction and control LSG exercised over the plaintiffs ought not to be viewed as indicative of an employment relationship, although the point was not developed in submissions.

[82] We perceive difficulties with the argument. First, it suggests that only factors within the putative employer's control should be taken into account, or at least given much weight, in considering the real nature of the relationship. Second, at its core the argument is based on an assumption that *any* position can be filled by an independent contractor regardless of the control test. This reflects an assumption

which has not, as far as we are aware, been tested yet. Alternatively it suggests that

36 *Autoclenz*, above n 34, at [30]; citing *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ

98[2009] EWCA Civ 98; , [2009] ICR 835 at [50].

the control test should have no application when dealing with a security-regulated position. That is contrary to both statute and case law.

[83] In *Bryson*, while Judge Shaw found that it was "absolutely essential" that the directors of Lord of the Rings exercise a very high level of control over Mr Bryson, she nevertheless concluded that the features of control were strongly indicative of an employment relationship.37 The subsequent judgments of the Court of Appeal and Supreme Court do not disturb this aspect of the Employment Court's analysis.38

[84] While we accept that it was necessary for LSG to keep a close eye on what was being done by those working on site to ensure that appropriate standards were reached in terms of its deliverables and that applicable safety and security concerns were being met, we consider that the high levels of direction and control, coupled with the extent to which the plaintiffs were integrated into LSG's business, points firmly towards an employment relationship.

Stage 4 – the fundamental test

[85] It is fanciful to suggest that either plaintiff was in business on their own account. They did not advertise their services, employ others, hold business assets, issue invoices or keep records. They could not delegate their work to anyone else, they enjoyed no scope for other business activities and they were exposed to no risk (and conversely no potential benefit) in terms of loss and profit. Neither plaintiff

was registered for GST, no GST was claimed by them and no expenses deducted for

37 *Bryson v Three Foot Six Ltd* [2003] NZEmpC 164; [2003] 1 ERNZ 581 (EmpC) at [48]- [49].

38 *Three Foot Six Ltd v Bryson* [2004] NZCA 276; [2004] 2 ERNZ 526 (CA); *Bryson v Three Foot Six Ltd (No 2)* (SC), above n 25. A similar result can be seen in *Autoclenz*, above n 34, at [37]; referring to the judgment of Judge Foxwell at the Employment Tribunal, the following observation was made at [36]: "I have noted that the claimants are required to wear company overalls and some of these are supplied free. I have also noted that they are provided with some training by the respondent.

I do not think that either of these factors is determinative in this case. I accept that training must

be provided to people who handle chemicals whatever their status for the purposes of health and safety. Equally I accept that requiring some badge of identification, in this case a uniform, is simply an incident of the fact that valeteers are permitted to drive high value goods, motorcars and vans. That said, I accept the claimants' evidence that they are fully integrated into the respondent's business and that they have no real other source of work."

[86] There is evidence that both Ms Tulai and Mr Prasad paid an ACC levy. The evidence in relation to such payments is, however, revealing. Both received a very nasty shock when ACC sent them an invoice after they had been working at LSG for some time. While they were demonstrably surprised to receive such a bill, and did not understand why it had been generated, they dutifully set about

finding the money ($3000 in Ms Tulai's case) and meeting what they believed to be their legal obligations. In the circumstances, we draw little assistance from the fact that ACC invoices were issued and paid by each of the plaintiffs.

[87] We have no difficulty concluding that the expectation was that each of the plaintiffs would undertake the work for LSG personally. There was no evidence of substituted labour. Rather, the evidence before the Court was that when Mr Prasad was absent from his job no other worker took his place.

[88] Nor do we have any difficulty concluding that Mr Prasad and Ms Tulai had extremely limited opportunities to increase their remuneration absent negotiating a higher hourly rate of pay (it appears that Mr Prasad received a $1 per hour increase during his time with LSG), given the continuous nature of the work, and hours, they undertook for LSG.

[89] The above factors point to a contract of service between each of the plaintiffs and LSG.

[90] For completeness we record that while the Supreme Court in *Bryson* made it clear that industry practice may be relevant to a consideration of the real nature of the relationship in the context of a s 6 inquiry,40 no evidence was called as to industry practice in this case and no counsel addressed any legal submissions to this

point. We accordingly put the issue to one side.

39 Note *Singh v Eric James & Assocs Ltd* [2010] NZEmpC 1 at [17], where it was held that: "Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor." See also *Bryson* (EmpC), above n 37, at [56], where Mr Bryson was found to have been an employee (having regard to the evidence as whole) despite having rendered invoices in relation to the work he had undertaken.

40 *Bryson* (SC), above n 25, at [35].

[91] Workers have a statutory right to seek a declaration as to whether they are employees and, accordingly, entitled to the minimum protections that go with that status. The traditional binary notion of employment, and unitary concept of employer, is increasingly being challenged by innovative ways of working and structuring relationships.41 It goes without saying that increasingly complex models give rise to increasing degrees of murkiness as to who, if anyone, bears what responsibility for working conditions. Fortunately s 6 is sufficiently flexible to deal with such difficulties in any given case.

[92] Much will depend on where a particular case sits on the spectrum. It is less likely that a host organisation will be found to be in an employment relationship with a labour hire worker where, for example, the arrangement and the obligations, rights and roles of each party is well documented, understood and agreed at the outset, and the work is provided on a supplementary and temporary basis. It becomes increasingly likely that an employment relationship will be found to exist where, for example, the documentation is non-existent or unclear; the work is of indefinite duration, is expected to be provided and is expected to be performed by the individual; a significant degree of supervision, control and direction is exercised by the host; and performance issues are dealt with by it.

[93] In assessing where on the spectrum a case sits the Court will closely scrutinise the way in which arrangements are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practice, to determine what the real nature of the relationship is.

[94] It is clear to us that neither of the plaintiffs had any real idea about the precise nature and scope of their legal relationship with either LSG or Solutions.42 And the

41 See, for example, the discussion in Mark Freedland and Jeremias Prassl "Employees, Workers and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom" (2017) 6 SLLERJ 16.

42 We note that reference was made to an application for a position within LSG which was made in Mr Prasad's name during his time with the company. It remained unclear what lay behind this step, and we do not accept that it reflected an understanding on Mr Prasad's part that he knew that he was not an employee of LSG.

reality is that those who were best placed to clarify matters for them, namely LSG

and/or Solutions, did not do so.

[95] Ms Meechan posed two rhetorical questions in closing to support the submission that there was plainly no contract of service between either plaintiff and LSG. First, what could LSG have done if the plaintiffs failed to show up for work on a particular day? Second, what could either of the plaintiffs have done if LSG had failed to roster them to work? It seems to us that neither question materially assists. That is because the answer depends on the outcome of the s 6 inquiry and, accordingly, a determination of the ultimate issue for the Court.

[96] The inquiry into the nature of the relationship is an intensely factual one. The true nature of the relationship between each of the plaintiffs and LSG emerges from the way in which it operated in practice. The reality is that (amongst other things) the plaintiffs had no control over the way they did their work; they had no control over where they did their work; they had no economic interest in the way in which the work was organised; they were subject to the strict direction and control of LSG supervisors at all times; they did not work as individuals; they had no say in the terms on which they performed the work; they had no input into the documentation that purported to reflect what sort of relationship they had with LSG, through Solutions, and with Solutions and later Blue Collar; they did not produce invoices for their work; the plaintiffs could do little to make their putative business more profitable; they were required to wear LSG uniforms; they were provided with training by LSG; they were fully integrated into the LSG business and they had no other

real source of work.

[97] We are satisfied that the evidence discloses the requisite mutuality of obligations between LSG and each of the plaintiffs. LSG plainly expected that the plaintiffs would turn up to work each day it rostered them on, unless a prior arrangement had been made with it; the plaintiffs plainly expected that when they did show up to work they would be given work by LSG; both parties understood that the plaintiffs would personally do the work; and each of the plaintiffs received payment for the work they did for LSG from LSG, albeit via Solutions. While Mr

Prasad later signed a self-styled employment agreement with Blue Collar we are satisfied that nothing substantively changed in reality.

[98] A labour-hire agreement does not represent an impenetrable shield to a claim that the "host" is engaging the worker under a contract of service. Much will depend on the particular facts of the individual case and an analysis of the real nature of the relationship, including how it operated in practice.

[99] That is, of course, nothing more than a simple statement of the way in which s 6 is intended by the Legislature to operate.

Result

[100] We conclude that each of the plaintiffs worked for LSG under a contract of service, and make declarations accordingly.

[101] For completeness we record that because of our finding, and because of the positions adopted by each of the parties in relation to the possibility of a joint employer relationship existing, we do not deal with the issue of whether LSG might share employer status with any other entity.

[102] Costs are reserved.

Christina Inglis

Chief Judge

for the full Court

Judgment signed at 4.30 pm on 29 November 2017
