

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 77
3170102

BETWEEN

BRENDAN SIGLEY
Applicant

AND

METALLIC SWEEPING
(1998) LTD
Respondent

Member of Authority: Sarah Kennedy

Representatives: Brian Fletcher, counsel for the Applicant
Tim McGinn, counsel for the Respondent

Investigation Meeting: 16 October 2022

Submissions and correspondence received: 21 and 27 October and up until 16 November 2022 from Applicant
21 October and up until 11 November 2022 from Respondent

Determination: 20 February 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Brendan Sigley says he is an employee. Metallic Sweeping Limited (MSL) say Mr Sigley is a contractor. Mr Sigley has worked at the Rai Valley Transfer Station as an attendant since 2015. MSL provides waste management services to the local authority including operating the transfer stations. All other transfer station attendants in the district are employees of MSL but because of the nature of the work at Rai Valley, including its size and remoteness, MSL says it made a deliberate decision to engage a contractor at Rai Valley.

[2] Over time, Mr Sigley became unhappy because he is not paid for public holidays. After raising this with MSL, he says he became aware he is considered to be a contractor, meaning he is not entitled to all the benefits that flow from an employment relationship. MSL say the flat rate he receives compensates him adequately for any inconvenience involved in needing to staff the transfer station on set days and keep the facility tidy outside of opening hours when and if required.

[3] MSL point out that all the other transfer station operators are paid at the minimum wage which is significantly less than what Mr Sigley's flat rate works out at when it is calculated as an hourly rate. Together with a non-taxable allowance that was negotiated to accommodate Mr Sigley using his own vehicle and the additional work during the summer season, MSL says his pay is a key indicator that he is a contractor and therefore not entitled to the usual employee benefits.

[4] Mr Sigley seeks resolution of the dispute as to whether or not he is an employee and claims all the benefits he was entitled to as an employee such as all leave types, payment for work on public holidays and Kiwisaver contributions.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Brendan Sigley, and for MSL, Clive Peter, Managing Director and Trevor Sheldon, Contract Manager (now retired). All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written and oral closing submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The Rai Valley Transfer Station

[7] When Mr Sigley first started the opening hours at Rai Valley were nine hours per week - 9:00am to 12:00pm Tuesdays and Fridays, and on Sundays, 1:00pm to 4:00pm. After several years with more holiday makers in the area, additional opening hours were added over summer. There are now fixed additional operating hours between Christmas and the first weekend after Waitangi Day increasing the opening

hours each week from nine to 18 hours. The transfer station is always open on set days and times even if it is a public holiday.

[8] Because of the smaller more remote situation of the Rai Valley and the limited operating hours, an after-hours solution for waste management is also provided in the form of a coin operated skip. This means customers can access the coin operated skip to deposit waste after-hours.

[9] The transfer station operator is required to attach the skip to a vehicle and relocate the waste to appropriate containers in the transfer station and empty and account for the coins. They are also expected to check the facility on a regular basis outside of opening hours and remove any waste dumped beside the coin skip or in the vicinity of the transfer station by members of the public. MSL says the operator was able to conduct those extra duties when they chose outside the transfer station hours so long as it was regular or when MSL had received a complaint about build up from the local authority.

[10] Mr Sigley accepted he sometimes worked outside of his normal work hours which was mostly attending to rubbish left out instead of being placed in the coin operated skip. He said he was happy to deal with this as he lived close by and wanted to see the area kept tidy. It was not a significant amount of additional work so he did not seek additional payment for it. On the other hand, MSL's view was the flat rate was calculated to include any additional work required to keep the transfer station clean and tidy outside of the opening hours.

[11] Mr Sigley kept a record of the takings from the coin operated skip and initially he travelled into Blenheim once a month to drop the money off and provide his report. He used his own vehicle for that travel and to empty the skip.

How did Mr Sigley come to be working at the Rai Valley Transfer Station?

[12] Mr Sigley was a Rai Valley resident. Another local resident previously carried out the role for MSL and approached Mr Sigley suggesting he apply for it. Mr Sigley spent a month or so learning the ropes. Unfortunately the previous resident had died some years ago. MSL indicated he would likely have had relevant evidence from its perspective.

[13] At the start, after learning the ropes, Mr Sigley says he was invited into MSL's offices in Blenheim and he met with Mr Sheldon. He was handed an employment agreement by Mr Sheldon and asked if he was happy with the pay rate. He looked at the pay rate which was \$307.69 per week and said he was happy with it. In his written brief he said he did not look through the rest of the agreement at that time, nor did he take any advice. By that stage he knew what the job was and he was happy with the hours and the pay rate.

[14] Mr Sheldon's written evidence was that he went through the agreement with Mr Sigley showing the crossed out parts that did not apply because Mr Sigley was on a flat rate and not an employee. He said Mr Sigley was happy with that and signed the agreement and initialled each page. There are inconsistencies with both of their evidence about this meeting. Mr Sigley could not remember initialling the pages but he clearly did and Mr Sheldon recalled Mr Sigley signing the agreement when the agreement provided to the Authority is unsigned by Mr Sigley.

[15] Nothing really turns on that conflict in the evidence because I preferred Mr Sheldon's oral evidence which was that they did not read the agreement together at that first meeting. Mr Sheldon said he knew Mr Sigley was on a fixed rate with no entitlements, but he was not able to explain the difference between a contractor and an employee in any detail and therefore unable to explain the crossings out.

Mr Sigley's extra hours

[16] After approximately three years, the coin operated site became particularly busy at times, including over Christmas, and additional hours were expected. Mr Sigley receives an entitlement under the Accident Compensation Act 2001 and any increase in his wages affects that. In light of that MSL entered into an arrangement with Mr Sigley where he was paid an allowance to compensate him for his fuel use. The allowance fluctuated and was mostly payable during the busy summer months when the extra hours were required. Mr Sigley communicated with his relevant case manager about the allowance and both parties seemed happy with that arrangement until Mr Sigley raised the issue of payment for work on public holidays.

[17] Supplementary submissions were made by MSL about the Accident Compensation log that was provided at the investigation meeting. While I accept a

number of the contacts recorded and highlighted are more suggestive of a contracting arrangement, on review of the whole document there are also entries that go towards Mr Sigley being an employee, for example that he asked the company to pay his partner directly for the work they did when he was sick. On that basis, and the fact Mr Sigley was required to account regularly to ACC, for an entirely different purpose because ACC were abating his compensation payments depending on his income, I have given them little weight.

The written agreements

[18] Mr Peter is the managing director of MSL. Due to the uncertain number of extra hours outside the operation of the transfer station, he said an independent contractor who lived locally would be preferable to employing someone on an hourly rate who might have to commute long distances and work fluctuating hours.

[19] On that basis Mr Peter said he worked out a flat rate he considered would compensate for variable operating times as well as the fluctuating additional hours and use of a personal vehicle to clear the coin skip trailer. He also included in the amount, compensation for a self-employed person to fund their own days off. He did not consider the issue of holidays for time off needed to be allowed for given the small time commitment that was required for these services each week. The contractor was expected to arrange cover for their own absences in consultation with the company manager.

[20] Mr Peter adapted an existing casual employment agreement to reflect the arrangement he intended to enter into, firstly with a previous person and then Mr Sigley, as independent contractors on a flat rate without the usual employment entitlements. He instructed Mr Sheldon, possibly over the phone, to strike out with a pen the terms in the employment agreement providing for employee entitlements such as annual leave, public holidays, sick leave and bereavement leave. The 90 day trial period clause remained and the front cover of the agreement recorded the title "WAGED INDIVIDUAL EMPLOYMENT AGREEMENT Metallic Sweeping (1998) Limited".

[21] The essential terms from Mr Peter's perspective were that the contractor would work on their own account and get paid a flat weekly rate on a fortnightly basis for running the operation at Rai Valley in accordance with the contract MSL had with the

local authority. He says in effect, the services in MSL's contract were subcontracted to Mr Sigley and the terms were set out in the amended casual employee agreement.

[22] In 2016, Mr Sigley was given a second agreement to sign. Both agreements had the same weekly rate and deleted provisions. No one could remember exactly why that happened. Mr Peter recalled that in 2016 all the employment agreements were reviewed by MSL's solicitor and some changes were made to their casual agreement template to ensure it complied with employment legislation changes. The updated agreement was circulated to all MSL branches with instructions to have existing staff sign the new version. Mr Sheldon could not remember but Mr Peter's evidence was that this may explain why Mr Sigley signed a second agreement at that time.

[23] I take from that evidence that Mr Sheldon was, as he says, unfamiliar with the differences between employees and contractors other than the basic differences. He treated Mr Sigley like all the other employees by providing him with an updated employment agreement to sign, albeit one with the same strike outs, because Mr Sheldon had not distinguished between employees and contractors.

[24] After Mr Sigley raised his issues with MSL, Mr Sheldon, at Mr Peter's request, met with Mr Sigley to offer him either employment at the minimum wage or a contract with a written agreement available for both, so that Mr Sigley could choose. Mr Sigley kept a copy of both but did not sign either. There is a conflict in the evidence in that Mr Sheldon says Mr Sigley said he understood he was better off being paid as a contractor and was going to choose that option. Mr Sigley says he never agreed to either and instead filed a statement of problem in the Authority.

The real nature of the relationship

[25] An employee is defined in the Act as someone who is employed by an employer to do any work for hire or reward under a contract of service. In determining whether a person is an employee or a contractor, the Act requires the Authority to consider relevant evidence about indications of the intentions of the parties but not to treat what they say as a definitive answer to the issues.¹ The Authority must consider the real nature of the relationship, which includes consideration of the degree of control exercised over the work done, how the people carrying out the work were integrated

¹ Employment Relations Act 2000, s 6(1) and (3).

into the business of the alleged employer and the extent to which they were working on their own account.²

What did the parties intend?

[26] In this case there is a conflict between the parties as to intention. Mr Peter clearly intended to engage a contractor whereas Mr Sigley says he was unaware of the distinction and was simply focussed on the hours and the wages and accepted MSL's offer based on that. MSL submitted Mr Sigley knew he was engaged as a contractor because he initialled the pages of the 2015 agreement which conflicts with his evidence that he did not read beyond the first page.

[27] In any event, MSL submit the labelling of the agreement cannot assist the Authority in determining the real nature of the relationship, particularly as the substance of the agreement was substantially modified to provide for flat rate remuneration and no employee benefits and it was clear the parties turned their mind to expressly removing the employment related benefits by deleting those clauses.

[28] Noting the agreement was never signed, and was called a "waged individual employment agreement", Mr Sheldon's evidence about his level of knowledge and his acceptance in his oral evidence that he and Mr Sigley did not read the document, I conclude that it is likely Mr Sigley was unaware it was MSL's intention that he be a contractor and I accept his evidence that he thought he was an employee.

[29] While labelling on its own and indeed few factors considered on their own are strongly determinative of the true nature of the relationship, it is my conclusion that while Mr Peter was very clear in his intentions, this was necessarily communicated to Mr Sigley.

[30] In any event the Act stipulates that how the parties describe the nature of their relationship is not a determining factor. How their relationship operates in practice is crucial to a determination of its real nature. The use of the term "all relevant matters" in the Act equally requires the Authority to consider the features of control and

² *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34 at [32].

integration and whether the contracted person had been effectively working on his or her own account.

Control and integration

[31] Both parties agree the role required very little supervision although they disagree on what that means in terms of the nature of the relationship. I do note Mr Sigley was required to regularly account for the coin skip money which in the summer period was significant. He would contact Mr Sheldon in the Blenheim office to advise when the bins needed clearing which would be weekly in summer and more like monthly in winter. He also kept a written record or report and delivered the money and the report regularly to Mr Sheldon.

[32] On the other hand, Mr Sheldon noted his relationship with Mr Sigley worked well and he was good at his job. He said Mr Sigley would go the extra mile with no fuss and dealt with local issues about the transfer station without any direction from Mr Sheldon. He accepts Mr Sigley was in regular phone contact and reported regularly.

[33] Mr Sigley used his own vehicle for some of the key tasks. This included towing the internal trailer out from the coin skip and taking it into the transfer station for emptying, as well as checking the area for loose rubbish dumped by the public, although Mr Sigley said he did that as he drove past rather than making special trips to check. He also used his car regularly to take money and reports to Blenheim.

[34] The use of a personal vehicle is more consistent with a contractor but after a period of time they negotiated an allowance that was described as compensation partly for fuel associated with Mr Sigley using his own vehicle and partly to cover extra hours that became necessary over time. Payment of an allowance tends to suggest an employment relationship but taking into account why an allowance was negotiated. This makes the vehicle use less clear.

[35] I find there was a degree of control over Mr Sigley with the requirement to account for the money, provide reports to Mr Sheldon and the fact that he did keep in touch with the Blenheim office and travelled regularly so had regular contact with Mr Sheldon and others.

[36] Consideration of integration into the company does not assist the analysis because of the remote location meaning Mr Sigley was always going to be working on his own even if he was an employee.

The fundamental test – was Mr Sigley working on his own account?

[37] The main question here is whether Mr Sigley was in business on his own account. Mr Sigley was paid regularly the agreed fixed amount with no requirement to complete time sheets as is typically required of employees. He was not required to provide an invoice which is a feature of a contracting relationship. PAYE was deducted from Mr Sigley's earnings albeit most likely due to Mr Sheldon being unaware of the differences between the two for tax purposes because all the other staff were employees.

[38] Somewhat confusingly, a payslip was generated for Mr Sigley for the purposes of having him qualify for a Covid-19 Leave payment. If Mr Sigley was self-employed he should have applied for the payment himself whereas employees were reliant on their employer to apply for the payment. What that means is Mr Sigley was treated the same way as all the other MSL employees when it came to that payment regardless of the employer's intentions.

[39] When Mr Sigley was unwell, he called Mr Sheldon and it was agreed Mr Sigley's partner would cover his position. The way it worked in practice could be argued both ways. On the one hand, Mr Sheldon agreed to it and the payment to Mr Sigley never changed so if it was sick leave taken by an employee it was appropriate it was paid. On the other hand, as a contractor, Mr Peter said MSL expected Mr Sigley to make his own arrangements if he was unwell so this arrangement could also be consistent with a contracting arrangement.

[40] The employment agreement was silent on this point but Mr Peter said the contractor was expected to arrange cover for their own absences "in consultation" with the company manager. On balance this factor is neutral because it is not clear whether Mr Sigley was free to substitute labour. There was not prohibition on it, but consultation was expected and there was evidence of occasions when Mr Sigley's partner was unavailable to provide cover and MSL provided cover.

[41] MSL also say Mr Sigley had a greater ability to make a larger profit during winter because he performed less services for the same flat rate. He received more during the off season, because he could perform most tasks within the operating hours, and he was able to negotiate payment for performing services during the busy period once they were considered more burdensome.

[42] There are several problems with that argument. Firstly, the opening hours were fixed by the local council so Mr Sigley had no flexibility as to when he worked, other than the small amount of additional work involved in keeping the site tidy. Secondly, they did agree on a payment when the work increased over time, but that was to cover fuel initially and then increase hours over the busy period. There was no profit for Mr Sigley associated with that.

[43] In 2015, Mr Sigley's weekly flat rate was \$307.69. Worked out as an hourly rate (for 9 hours work per week) this amounted to \$34.18 as opposed to the other transfer station operators who were on the minimum wage of \$14.75 at that time. Mr Sigley's weekly rate increased several times to \$331.15 per week and the minimum wage at the time of the investigation meeting was \$21.20. With the additional hours over summer and the payment of an allowance, it is difficult to accurately work out Mr Sigley's hourly rate but in the round it was significantly higher than the minimum wage.

[44] As a rule of thumb payments to Mr Sigley should have been much higher if Mr Sigley was genuinely a contractor because the rate of pay generally compensates for additional administration fees, lack of holiday and sick leave, insurance, ACC and tax levies and other costs associated with the operation of a business. The payments to Mr Sigley are strongly indicative of a contracting arrangement.

[45] PAYE was deducted from Mr Sigley's wages and he did not pay withholding tax. Mr Sheldon recalled at the start taking Mr Sigley's written agreement to the administrative staff and he surmised they arranged for PAYE to be deducted, in the same way they would have for all the other staff who were all employees. Mr Peter explained that as far as MSL knew, it was obliged to tax payments at source for the previous contractor because he did not have an exemption from withholding tax deductions and Mr Peter said he understood this worked out at the same rate at PAYE.

[46] Following the investigation meeting, Mr Sigley received correspondence from IRD advising him that he had been enrolled in Kiwisaver by his employer and this was provided to the Authority. The Authority asked for further information. MSL through its representative said it had no knowledge of Mr Sigley being enrolled in Kiwisaver. It was explained that MSL's payroll system encountered an error and following a restart it changed the payroll settings for Kiwisaver deductions for a number of employees including Mr Sigley.

[47] This error appears to be a feature of the fact that MSL were treating Mr Sigley as if he was an employee at least for tax purposes and that was accepted by MSL.

Overall impression

[48] It has long been established that application of the tests to determine whether a person is a contractor or an employee, requires the Authority to consider, broadly and realistically rather than narrowly and artificially or legalistically, the real nature of the commercial relationship between the parties.³

[49] In *Leota v Parcel Express* the Court held that these cases are "intensely factual" and must be determined accordingly and described the issue as follows:⁴

[30] An employee works for an employer, within employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[50] Put another way an independent contractor is seen as autonomous, arranging their own remuneration, holidays and other conditions. Employees on the other hand lack that autonomy and work for pay or wages.

[51] I accept it was Mr Peter's intention that Mr Sigley be engaged as a contractor, however, other than the rate of pay there is no definitive evidence that Mr Sigley was operating a business on his own account. When Mr Sigley turned his mind to it after he became concerned about working on public holidays with no additional payment, he thought he was an employee.

³ *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 at [9].

⁴ *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [30].

[52] At every meaningful exchange with the company Mr Sigley's view that he was an employee was reinforced. Providing an updated casual employment agreement intended for employees in 2016, applying for a Covid-19 Leave payment designed for employees, deducting PAYE from Mr Sigley's earnings and enrolment in Kiwisaver are all consistent with an employment relationship, regardless of Mr Peter's clearly stated intention that MSL engaged a contractor and the explanations given for each of these.

[53] Despite Mr Peter's intention, Mr Sheldon however, was simply unaware of the difference between employees and contractors and I find that on the whole he treated Mr Sigley in the same way he treated all the other employees. There was likely less oversight but I am not convinced that was a feature of an independent contracting arrangement but more a necessity given the remoteness of the Rai Valley together with the smaller size of that transfer station and Mr Sigley's competence in the role, the fact he showed initiative and was able to work unsupervised.

[54] This means I am satisfied that on balance the real nature of the relationship and the way in which it operated in practice was more akin to an employment relationship.

Orders

[55] Brendan Sigley is an employee and Metallic Sweeping (1998) Limited is ordered to pay Brendan Sigley holiday and public holiday pay arrears and any Kiwisaver contributions that should have been made.

[56] In the event the parties are not able to reach agreement on the amounts owing leave is reserved to return to the Authority.

Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Sigley may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum MSL would then have 14 days to lodge any reply memorandum.

[58] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Sarah Kennedy
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1