IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2021] NZEmpC 69
EMPC 254/2019

IN THE MATTER OF	an application for declarations pursuant to s 6(5) of the Employment Relations Act 2000
BETWEEN	KEANU HEAD First Plaintiff
AND	JAMES LOGIE WRIGHT Second Plaintiff
AND	SAMUEL GREGORY Third Plaintiff
AND	REBECCA LANGFORD Fourth Plaintiff
AND	ASHLEIGH CRICHTON Fifth Plaintiff
AND	TAMARA JOAN EVANS Sixth Plaintiff
AND	DYLAN CROOK Seventh Plaintiff
AND	WENDY KAIN Eighth Plaintiff
AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT First Defendant
AND	MADISON RECRUITMENT LIMITED Second Defendant

Court:	Judge B Corkill Judge J Holden Judge K Beck
Hearing:	9 – 20 November 2020 (Heard at Wellington)

Appearances: P Cranney and F Fitzsimmons, counsel for the plaintiffs
S Hornsby-Geluk and P Gillespie, counsel for first defendant
G Service and K Rolland, counsel for second defendant

Judgment: 14 May 2021

JUDGMENT OF THE FULL COURT

Introduction

[1] The eight plaintiffs entered into employment agreements with Madison Recruitment Ltd (Madison), who placed them for work purposes with the Inland Revenue Department (IR).[1]

[2] Subsequently, proceedings were brought under s 6 of the Employment Relations Act 2000 (the Act), where it was contended the real employment relationship for such employees was with IR and not Madison.

[3] Originally, there were four plaintiffs only. Then, a second amended statement of claim was filed in which the four plaintiffs pleaded they were suing not only on their own behalf, but also on behalf of 36 persons listed in an attachment. Because there was an objection to this course, an application for directions as to representation was filed; the Court concluded there was an insufficient commonality of interests between the existing plaintiffs and the proposed representees, and that it was not in the interests of justice for a representative procedure to be utilised. The application was therefore dismissed.[2]

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1 The first defendant is the Commissioner of Inland Revenue, and Chief Executive of the Inland Revenue Department, but for convenience, we refer to the nomenclature adopted by the parties for the defendant, Inland Revenue (IR), unless the context requires express mention of the Commissioner.

2 *McCook v Chief Executive of the Inland Revenue Department* [2020] NZEmpC 109, [2020] ERNZ 295.

[4] Subsequently, five further persons were joined as plaintiffs. Then Mr McCook, the original first plaintiff, discontinued due to ill health, and Mr Head was joined in his place.[3]

[5] Turning to the position of the defendants, initially the proceeding was brought by the plaintiffs against IR only. As a result, Madison applied to be joined. This application was granted since the proceeding could have potentially impacted on its interests.[4] In their subsequent pleadings, however, no relief was sought by the plaintiffs against Madison.

[6] Given the importance of the issues, specifically and generally, Chief Judge Inglis determined that a full Court should hear and determine the proceeding.

The topics to be addressed

[7] The central issue in the case relates to the real nature of the relationship between each plaintiff and IR. Having regard to the wide range of information and arguments raised, the following topics must be addressed:

a) the factual background which gave rise to the arrangements between the parties;

b) the difference between the provision of recruitment services (only), and a labour-hire arrangement;

c) the agreements into which the parties entered;

d) the intentions of the parties;

e) the operation of the relationships in practice;

f) the relevant common law tests;

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3 *Head v Chief Executive of the Inland Revenue Department* [2020] NZEmpC 155.
4 *McCook v Chief Executive of the Inland Revenue Department (No 1)* [2019] NZEmpC 189.

g) other matters; and

h) conclusions.

[8] For the reasons outlined, the application for declarations by the plaintiffs are dismissed.

The background facts

[9] For at least the last 12 years, IR has utilised agency-employed resources, which it refers to as "contingent labour" – that is, persons engaged on a temporary basis. Such workers are used to manage workflow and customer demand peaks through IR's annual tax cycles, and to support limited term change activities.

[10] In August/September 2017, IR initiated a Request for a Proposal (RFP); it wished to engage a provider to support it through what it described as the standard tax peaks IR has each year, and to ameliorate anticipated increased workflow as a result of a significant Business Transformation project it was undertaking.

[11] This was an initiative involving a series of overlapping steps; significant releases occurred, and will continue, from 2017 to 2021. Relevant for present purposes is that the sequential releases include significant workforce alterations, designed to improve the skills and capabilities of IR's employees, and to reduce the number of its permanent full-time equivalent staff, as well as increasing the number of its fixed-term staff and contractors. In part those changes were, and are, related to the introduction of a new technology platform for dealing with taxation issues, START.

[12] Madison is a long-established recruitment and labour-hire agency; it deals with entities in both the public and private sectors. Its labour-hire business includes employing individuals on temporary or fixed-term assignments and placing them with clients.

[13] The company is also an approved provider of recruitment services to government agencies, having been appointed to do so under the All of Government procurement process.

[14] Madison considered it was able to offer a broad candidate pool, not only by advertising, but also via a register it maintained of persons who wished to obtain work on a short-term or temporary basis. It says it was well placed to cope with the significant scale of recruitment, sourcing and management of a temporary workforce required by IR.

[15] The outcome of the RFP process was that IR awarded a contract to Madison to provide "Contingent Workforce Management Services" for its Customer Compliance Services (CCS) activities. This was a new business group, which IR said would assist customers with their tax arrangements and compliance issues (businesses) and to access entitlements (individuals).

[16] Madison's terms of engagement by IR were approved by the Ministry of Business, Innovation and Employment (MBIE).

[17] The MSA was signed by IR and Madison in March 2018, allowing for two, two-year rights of renewal, after an initial three-year term. Its contents will be discussed in detail later.

[18] The MSA was not the only document which related to the arrangements entered into by IR and Madison.

[19] Statements of Work (SoWs) were produced by IR from time to time which outlined the scope of assignments to be performed by those engaged by Madison. In the main, the work involved call centre tasks.

[20] It also developed two further documents which described the way in which persons introduced by Madison to IR would be managed. These were titled Standard Operating Procedures (SOP) and Managing Madison Employees.

[21] An applicant for assignment to IR would be offered a customer service officer (CSO) or a customer service assistant (CSA) role; none of the plaintiffs assumed the latter role. In the course of an engagement, each person would be provided with a proposed individual employment agreement (IEA) where the parties were Madison

and the individual worker, a job brief on Madison letterhead which described the nature of the relationship between the parties and the terms and conditions under which the applicant would be employed, a job description as prepared by IR, and a copy of IR's Code of Conduct (the Code).

[22] A final preliminary matter relates to the involvement of the Public Service Association Te Pūkenga Here Tikanga Mahi Inc (PSA).

[23] In the second half of 2018, the PSA engaged with those employed with Madison to initiate a membership drive. The plaintiffs were all members of the PSA for various times and durations between July 2018 and September 2019. On 17 April 2019, the PSA gave to Madison a notice of initiation of bargaining for a single employer collective agreement. The notice stated that the intended coverage clause of the collective would be:

> All employees who are employed by Madison Recruitment Ltd to assist Madison Recruitment Ltd to perform its obligations under service contract/s with the Inland Revenue throughout New Zealand.

[24] Madison employees were advised of the notification; they were told that Madison intended to participate in bargaining with the PSA in good faith and would consider all Madison staff (both Union and non-Union members) when doing so.

[25] However, bargaining did not proceed. Then, on 10 July 2019, the PSA wrote to the Commissioner, referring to previous correspondence and discussions. The letter noted that the union was concerned about the relationship between Madison and IR. The view was expressed that the real nature of the employment relationship was one between IR and the employees introduced by Madison.

[26] Lawyers acting for IR responded on 24 July 2019, outlining how Madison employees were utilised. The letter stated there were significant differences between the way IR manages Madison employees, and the circumstances considered by the Court in *Prasad v LSG Sky Chefs New Zealand Ltd*,[5] a case which had been relied on by the PSA.

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5 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835.

[27] The letter went on to state that the relationship between Madison and IR was a commercial one, and that Madison remained the genuine and true employer of staff engaged by it to perform work for IR.

[28] On 5 August 2019, the present proceedings were issued by several of the plaintiffs as described earlier, supported by the PSA.

Overview of the parties' cases

Plaintiffs' case

[29] The plaintiffs operative statement of claim refers to arrangements entered into, firstly, between Madison and IR.[6] Reference was made to the various documents entered into between IR and Madison on the one hand, and between Madison and the plaintiffs on the other.

[30] The statement of claim also referred to circumstances which led to the filing of the proceedings, including the correspondence between the parties as to the nature of the relationship between Madison workers and IR, to which we have already referred.

[31] Several allegations were then raised by the plaintiffs on the basis of these factual circumstances:

a) Section 41 of the State Sector Act 1988 (SSA) applied, so that the Chief Executive (CE) of IR could only delegate her statutory functions, responsibilities, duties and powers to the plaintiffs if they were *her* employees.

b) The MSA was unlawful because certain payments which were to be made under it by IR to Madison amounted to an "unlawful premium" under s 12A of the Wages Protection Act 1983 (WPA); further, the agreement to appoint under the document breached the notification requirements of s 61 and the merit requirements of s 60 of the SSA.

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6 The operative pleading was the seventh amended statement of claim; it will be referred to as "the statement of claim".

c) Each plaintiff was party to an individual written agreement with Madison which was neither an agreement nor an employment agreement; rather, each was provided to IR under a recruitment agreement. Each person worked for IR in the same manner as its other employees. IR controlled the plaintiffs and they were integrated into IR. The real nature of the relationship meant IR was the employer of the plaintiffs. It was not contended that IR was a joint employer.

[32] A declaration was sought by each plaintiff that at all material times the real nature of the relationship between the plaintiffs and the Chief Executive of IR was that she was the employer of the plaintiffs, and the plaintiffs were her employees.

IR's case

[33] IR acknowledged the existence of the various documents referred to in the statement of claim, albeit relying on their wording for an accurate description of their meaning and relevance. Then it was asserted:

a) IR did not apply s 41 of the SSA incorrectly.

b) The MSA contained no "unlawful premium", as contemplated by s 12A of the WPA; and ss 60 and 61 of SSA did not apply to the plaintiffs since they were employees of Madison.

c) It had no knowledge of the assertion that documentation between the plaintiffs and Madison did not amount either to an agreement or an employment agreement. IR said the plaintiffs were provided to IR by Madison in accordance with the MSA and relevant SoWs; they did not undertake the full range of duties performed by IR's employees; IR did not control those persons; and they were not fully integrated into IR's core operations.

d) The relationship between Madison and IR was a genuine commercial relationship; further, Madison remained the true employer of staff engaged by it to provide services to IR. The awarding of a declaration was thus opposed.

Madison's case

[34] Madison pleaded in respect of each plaintiff that an individual employment agreement had been entered into between that person and Madison. It too acknowledged the use of the various documents, relying on the particular provisions contained in them.

[35] Then it asserted:

a) An employment agreement and a related job brief between Madison and each plaintiff were on foot at all material times; no plaintiff had denied the existence of the employment relationship between themselves and Madison; the plaintiffs acted consistently with their obligations under their employment agreements with Madison.

b) No plaintiff was under a recruitment agreement; those persons were placed on assignment with IR as part of Madison fulfilling its obligations to provide services under the MSA.

c) No plaintiff worked for IR in the same manner as other IR employees. The plaintiffs were not integrated into IR; rather, they were integrated into the business of Madison in various respects.

d) Madison asserted that the real nature of the relationship between Madison and the plaintiffs was an employment relationship and that both Madison and those persons conducted themselves consistently with this being the case.

e) The real nature of the relationship between IR and Madison was a genuine relationship between two commercial parties. There was no joint employment relationship on foot as Madison was the sole employer of the plaintiffs.

[36] Madison accordingly opposed a declaration being made that IR was the employer of the plaintiffs at all material times.

The hearing

[37] Comprehensive evidence was led by the parties. Each plaintiff gave evidence; and they called an IR employee. IR called 12 witnesses – members of management and team leads. Madison called two members of its management. All witnesses described the employment arrangements for the plaintiffs in detail. Some 16 volumes of documents were also produced. Very comprehensive submissions were advanced by all counsel in support of the parties' respective positions. All this material has been carefully considered.

Difference between recruitment services and labour-hire arrangements

[38] At the heart of the plaintiffs' case is the assertion that the reality of the arrangements they entered into was they were recruited by Madison to work for IR and thereby became IR employees. It is therefore important to acknowledge the distinction between recruitment services and labour-hire arrangements.

[39] We adopt the succinct summary of these models, as set out in *Prasad*:[7]

> [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 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.[8]

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7 *Prasad*, above n 5.

8 Andrew Stewart *Stewart's Guide to Employment Law* (5th ed, The Federation Press, Annandale (NSW), 2015) at 4.8–4.12.

[40] Mr Cranney, counsel for the plaintiffs, was strongly critical of labour-hire arrangements, saying for example that under such practices, workers become a kind of saleable chattel in a sense previously unknown in the common law of master and servant.

[41] This submission requires further discussion as to the nature of this mode of employment, as understood overseas as well as in New Zealand.

[42] The full Court in *Prasad* considered overseas trends regarding labour-hire practices, by reference to several sources.[9]

[43] First, the Court referred to academic discussions, one of which described the "pure" labour-hire industry which developed in the late 1980s to replace or supplement existing employees in highly unionised and dispute-prone industries such as construction.[10] From then on there has been a dramatic growth in this form of labour-hire.[11]

[44] Second, reference was made to the Private Employment Agencies' Convention 1997 (No 181), implemented by the International Labour Organization (ILO), which required 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. A 2009 ILO issues paper regarding Convention No 181 stated that against a background of the rapid expansion of the industry, the Convention balanced business needs for flexibility to expand or reduce with workers' needs such as employment stability and a safe working environment.[12]

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9 *Prasad*, above n 5, at [23]–[29].

10 At [25]: Stewart, above n 8, at 4.8–4.12.

11 Industrial Relations Victoria *Victorian Inquiry into the Labour Hire Industry and Insecure Work – Final Report* (31 August 2016) at 2.1.2.

12 International Labour Organisation *Private employment agencies, temporary agency workers and their contribution to the labour market* (20–21 October 2009) at 5.

[45] Third, overseas authorities were referred to. In some instances, particular labour-hire arrangements were upheld.[13] In other cases, the courts did not exclude the possibility of an employment relationship with the end user, notwithstanding the labour-hire context. The Court noted that much would depend on the particular facts.[14] We will return to these cases later.

[46] The fourth body of material considered in *Prasad* related to legislative action, and development of guidelines as developed in numerous overseas jurisdictions.[15] Reference was made to the fact that most member-states of the European Union have some form of licencing or registration system for labour-hire organisations. It was noted that the central concern giving rise to such initiatives internationally appeared to be the extent to which an organisation, which would otherwise have employed labour directly, may legitimately sidestep minimum employment standards by entering into an agreement with a third party claiming that the workers provided under that contractual arrangements were independent contractors or employees of the labour-hire company.[16]

[47] These materials confirm two key points as to the overseas position. First, labour-hire, as distinguished from recruitment services, is not an uncommon phenomenon. Second, whilst it has been recognised that workers' rights may require statutory protection, these concerns have not proceeded on the basis that the utilising of agency labour is inherently illegal.

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13 See for example *Muschett v HM Prison Service* [2010] EWCA Civ 25; *Damevski v Giudice* [2003] FCAFC 252, at [173]. These and other judgments were discussed in *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223, with it being made clear that the issue of whether there was a contract of service fell for determination under s 6.

14 *Prasad*, above n 5, at [29], referring to *BWIU v Odco Pty Ltd* (1991) 99 ALR 735 (FCR); *Mason & Cox Pty Ltd v McCann* [1999] SASC 544 and *Wilton & Cumberland v Cole & Allied Operations Pty Ltd* [2007] 161 FCR 300, [2007] FCA 725. A variety of techniques have been used to consider labour-hire arrangements, such as whether there is a mutuality of obligations (*Murchett*, above n 13); whether there is an intention to create legal relations (*Damevski*, above n 13); and whether a contract could be implied (*Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, [2004] IRLR 358). They all arise in different labour law settings.

15 Reference was made to the Employment Agencies Act 1973 (UK), the Labour Hire Licencing Act 2017 (South Australia) and material on the website of the Australian Fair Work Ombudsman (Fair Work Ombudsman "On Hire Employee Services – Workplace Obligations" www.fairwork.gov.au. See also *Victorian Inquiry*, above n 11, at 5.2.

16 Annette Thornquist "False Self-Employment and Other Precarious Forms of Employment in the Grey Area of the Labour Market" 2015 31 IJCCLIR 411.

[48] The same conclusion applies to the history of the issue in New Zealand where labour-hire employment has become increasingly common. A report from Statistics New Zealand for December 2016, for example, confirmed that 10 per cent (219,600) of paid employees were temporary employees, and of this 4.6 per cent (10,100) were temporary agency employees. Such workers are recruited for a temporary role (as a contractor or employee of the client) or are assigned under labour-hire arrangements.

[49] Notwithstanding the potential for the labour-hire model to seriously disadvantage workers through breaches of employment standards, such as underpayment or non-payment of wages, and lack of financial security because of the casual nature of the work provided, statutory protection has only recently been enacted in New Zealand. A brief history of that topic is appropriate.[17]

[50] Despite its promulgation in 1997, New Zealand did not then, and has not since, ratified ILO Convention No 181.

[51] In 2008, the Employment Relations Amendment Bill (No 3) was introduced.[18] Its object was to strengthen the position of employees in a "triangular employment relationship".[19] The Explanatory Note to the Bill stated:[20]

> ... a triangular employment relationship exists where an employer contracts the services of the employee to a third party (the controlling third party), and the controlling third party has the right to control the employee's work.

[52] However, the Bill was discharged on 6 March 2009 due to a change of government.

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17 We were referred to two early New Zealand judgments which touched on the reality of employment arrangements: *New Zealand Waterside Employers' Assoc v Waterfront Control Commission* (1945) GLR 317 (CA), and *New Zealand Waterside Workers' IOUW v New Zealand Waterside Employers Assoc* (1948) GLR 489 (CA). The dicta, however, turn on circumstances arising in a different statutory and regulatory regime, albeit they demonstrate the willingness of the Court to assess realities in that context.

18 Employment Relations Amendment Bill (No 3) 2008 (289-1).

19 This term is widely used overseas in academic texts, see for example Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, Oxford, 2016) at 333; and for some time in judgments, for example *Forstaff Pty Ltd v Chief Commissioner of State Revenue* (2004) 144 IR 1.

20 Employment Relations Amendment Bill (No 3) 2008 (289-1) (explanatory note) at 1.

[53] Issues relating to such a form of employment, however, remained live. In 2014, MBIE sought feedback on a range of issues concerning breaches of employment standards; in that context, it stated in a discussion document:[21]

> Working arrangements that involve "triangular relationships" in which a worker is employed by one employer to work for another employer – are particularly susceptible to this kind of [serious breach of employment standards].

[54] Employment relationships of this kind then came before the Court on two subsequent occasions in 2010 and in 2017.[22] In both instances, a s 6 analysis was considered appropriate. These cases will be considered shortly.

[55] In 2018, the Employment Relations (Triangular Employment) Amendment Bill was introduced and enacted.[23] It referred again to the concept of a "controlling third party", a term which is now defined in s 5 as follows:

> **controlling third party** means a person—
>
> (a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
>
> (b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee
>
> ...

[56] The possibility of joining a controlling third party for the purposes of a personal grievance was also introduced;[24] as was the possibility of obtaining remedies against such a party.[25] It is apparent from these amendments that the definition of a controlling third party is now expressly relevant to a s 6 analysis. Since the amendments took effect on 27 June 2020, those provisions do not apply to the present case.

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21 Ministry of Business, Innovation and Employment *Playing by the Rules – Strengthening Enforcement of Employment Standards* (9 June 2014) at 11.

22 *McDonald v Ontrack Infrastructure* [2010] NZEmpC 132, [2010] ERNZ 223; *Prasad*, above n 5.

23 Employment Relations (Triangular Employment) Amendment Act 2019.

24 Employment Relations Act 2000, s 103B.

25 Section 123A.

[57] At each reading of the Bill it was acknowledged that a triangular employment arrangement is a legitimate form of employment.[26] The relevant select committee, the Education and Workforce Committee, commented on the statement in the first reading that a growing number of New Zealanders work under triangular employment arrangements, by observing they "represent an important part of the workforce", particularly for businesses subject to seasonal fluctuations or needing labour at short notice.[27]

[58] As mentioned, Mr Cranney was critical of this type of employment. Elaborating on the submission referred to earlier, he said that such arrangements are a mechanism at the low end of the labour market which undermine wages and conditions and lead to the spread of minimal conditions and distorted and unacceptable work relationships with excessive employer domination.

[59] We prefer to proceed on the basis already discussed, that agency-hire arrangements are not illegal at common law, but it is the case they can be open to abuse.

[60] Moreover, in New Zealand, where an agency-hire worker contends they are in fact an employee of the host, the issue must be assessed under s 6 of the Act. We turn now to that provision.

Section 6

[61] At the time of the events with which we are concerned, s 6 materially read:

> **6 Meaning of employee**
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> (1) In this Act, unless the context otherwise requires, employee—
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> (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
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> (b) includes—
>
> (i) a homeworker; or
>
> (ii) a person intending to work; but
>
> (c) excludes a volunteer who—

[26] See for example (2019) 737 NZPD 10251 and (2019) 739 NZPD 12320.

[27] Employment Relations (Triangular Employment) Amendment Bill 2018 (17-3) (select committee report) at 1.

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer; and

(d) excludes, in relation to a film production, any of the following persons:

(i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:

(ii) a person engaged in film production work in any other capacity.

(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.

(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.

...

[62] The Supreme Court considered the section in *Bryson v Three Foot Six Ltd.*[28] That was of course a case concerning the issue of whether Mr Bryson was an independent contractor or an employee, which is the problem that arises in most s 6 cases that come before the Court.

[63] The Court emphasised the importance of considering all relevant matters when determining the real nature of the relationship, making these points:[29]

(a) "All relevant matters" would certainly include the written and oral terms of the contract between the parties, which would usually contain indications of their common intention concerning the status of their relationship.

(b) Those matters would also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship is operated in practice. It is important there should be consideration of the way in which the parties have actually behaved in implementing their contract.

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28 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] 3 NZLR 721.

29 At [32].

(c) The phrase "All relevant matters" equally clearly requires the Court to have regard to features of control and integration and as to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law.

(d) It is not until there has been an examination of the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.

[64] There are several further points that apply to all s 6 cases. None of the common law tests individually will necessarily be conclusive, although respective weight will be placed upon them depending upon the overall factual matrix.[30] What is important is an overall impression of the underlying and true or real nature of the relationship between the parties.[31]

[65] It is well established that all of this requires an "intensely factual" analysis, in order to determine the real nature of the relationship;[32] and one that can often be difficult since there may be indicia pointing both ways.[33]

[66] All these observations demonstrate the broad reach of the section, which must be applied to take account of the individual circumstances under consideration.

[67] We turn next to the New Zealand cases which have addressed labour-hire issues.

Ontrack

[68] The first is *McDonald v Ontrack Infrastructure Ltd.* Mr McDonald entered into an individual casual employment agreement with a labour-hire company, Allied.[34] There had been a contract between Allied and Ontrack for the supply of casual labour. Then Mr McDonald was placed with Ontrack. He later claimed that at some point following his placement he had entered a contract of service with that company.

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30 *Clark v Northland Hunt Inc* [2006] 4 NZELR 23 (EmpC) at 22.
31 *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) per McGrath J dissenting, this approach being undisturbed on appeal to the Supreme Court.
32 *Franix Construction Ltd v Tozer* [2014] NZEmpC 159, [2014] ERNZ 347 at [44].
33 *Prasad*, above n 5, at [38].
34 *McDonald,* above n 22.

[69] Obviously, Mr McDonald could only pursue his claim for relief against Ontrack if he could establish that a contract of service existed between him and that company. A preliminary question was considered relating to that issue only.

[70] For that purpose, the Court in *Ontrack* observed:[35]

> 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.

[71] This decision has led to subsequent discussion as to whether the approach adopted in *Ontrack* has broad application.

[72] In the later case of *Prasad*, the Court noted that while what might be described as a strict contractual approach appeared to have received endorsement in *Ontrack*, that simply reflected the way in which the case was argued. We agree.

[73] In further discussion as to the findings in *Ontrack*, the *Prasad* Court went on to say that the question under s 6(1) as to whether a person is employed to work under a contract of service, is not to be answered by asking whether there was a contract; and if so, what its nature is; and if not, that is the end of the inquiry.

[74] Rather, as s 6(2) makes clear, the question is answered by "... working backwards, from an assessment of the real nature of the relationship." Mr Cranney argued this statement was an important pointer as to how a s 6 analysis should proceed.

[75] However, that Court found in effect that a focus *only* on the formal elements of contract formation would put the cart before the horse and sit uncomfortably with the statutory imperative of considering the reality of the working relationship to determine its contractual status.[36]

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35 At [36].
36 At [34].

[76] The *Prasad* observations are not to be construed as meaning that the terms of any agreement are not relevant or should be considered last. Indeed, as the three-step analysis adopted in that case shows, the terms of an agreement may well be an appropriate starting point.

[77] In its discussion of "all relevant matters", the Supreme Court in *Bryson* referred first to the written and oral terms of the contract between the parties, which it said will usually contain indications of their common intention concerning the status of their relationship.[37]

Prasad

[78] Since *Prasad* is the only case to date which has been required to consider an agency-hire employment relationship on its facts, it is appropriate to consider the approach which was adopted in that Court's analysis of s 6 factors. All counsel provided detailed submissions as to whether the *Prasad* approach was directly applicable in this case. A brief summary of the case is therefore necessary.

[79] Solutions Personnel Ltd (Solutions) and Blue Collar Ltd were labour-hire companies. LSG Sky Chefs (LSG) contracted with them for the provision of large numbers of workers, including Mr Prasad and Ms Tullie, to work in its inflight catering business.

[80] When those persons commenced working for Solutions, they each signed a document which purported to be an independent contract between them and Solutions. The Court noted that Mr Prasad later signed a "self-styled employment agreement" with Blue Collar, but nothing changed in reality.[38] They were paid by Solutions for the work they did for LSG. Solutions was in turn paid by that entity for the hours Mr Prasad and Ms Tullie worked. Both were engaged in full-time work with LSG, one of them for four years, the other for two years. There were no written agreements between them and LSG.

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37 *Bryson*, above n 28, at [32].
38 *Prasad*, above n 5, at [50] and [97].

[81] The key issue was whether Ms Tullie and Mr Prasad were, as they contended, employees of LSG. For its part, LSG argued the two were independent contractors; alternatively, if they were not independent contractors, they were employees of Solutions.

[82] The Court described the arrangement as involving an issue as to a triangular, labour-hire relationship between an end-user and an intermediary.[39] It held that s 6, as interpreted in *Bryson,* required it to assess whether Mr Prasad and Ms Tullie were engaged under contracts of service with LSG, having regard to all relevant matters. These included the written and oral terms of any agreement, the way the relationship operated in practice, and any features of control and integration. It was the real nature of the relationship that was determinative. After considering all these factors, the Court concluded that both the workers worked for LSG under a contract of service and made declarations accordingly.

[83] Mr Cranney submitted the approach adopted in *Prasad* was instructive in the present case. He said this Court should attribute similar weight to the various factors which were assessed in *Prasad*, and then reach the same conclusion it did, that in reality, the end-user was the employer.

[84] In a related submission, Mr Cranney argued that cases from the United Kingdom reinforce the importance of analysing facts in light of statutory objectives, citing dicta in *Autoclenz Ltd v Belcher* and *Uber BV v Aslam* where comments were made that such an approach would be appropriate in a variety of contexts – not only employment scenarios, but also in the fields of tenancy and taxation.[40] He stressed that the UK cases, like *Prasad*, emphasised form should not trump substance when ascertaining the realities.

[85] Turning to the position of the defendants, Mx Hornsby-Geluk did not accept the circumstances of this case were on all fours with *Prasad*, for a range of reasons. First, the facts in that instance differed from those in the present in a key respect. The primary issue identified by the Court was whether the claimants were independent

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39 *Prasad*, above n 5, at [31].
40 *Autoclenz Ltd v Belcher* [2011] UKSC 4; *Uber BV v Aslam* [2021] UKSC 5.

contractors or employees; this was important because workers outside the umbrella of legislative protection are exposed; those who are employees in any event are not exposed in that sense.[41]

[86] Mx Hornsby-Geluk said the approach adopted in *Prasad* reflected the policy objective which was spelt out in the explanatory note of the Bill that introduced s 6, that the test was to stop some employers labelling individuals as "contractors" to avoid responsibility for employee rights such as holiday pay and minimum wages.[42]

[87] Mx Hornsby-Geluk also argued that the circumstances of the claimants in *Prasad* were clearly distinguishable on numerous factual grounds, which were outlined.

[88] In a related submission, Mx Hornsby-Geluk said the Employment Relations (Triangular Employment) Amendment Act 2019 was a recognition of triangular employment arrangements that had been judicially recognised prior to the legislation taking effect, for instance in *Prasad*. The amendment affirmed that a degree of control and direction, similar to that of an employer, was typically exercised by an end-user over workers provided by an intermediary in such a situation.

[89] In Mx Hornsby-Geluk's submission, the circumstances of a tripartite case require a more nuanced approach than that referred to in *Bryson*. It was argued the starting point should be the written documentation between the parties; then the Court should consider the way the relationship operated in practice as a means of assessing whether the parties may have diverged from the relevant agreements. Given IR was in fact a "controlling third party" in a legitimate triangular employment relationship, it was to be expected control would be exercised by it.

[90] Finally, a range of overseas judgments were referred to, it being argued that these could be of assistance, given the paucity of relevant cases in New Zealand.

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41 Noted in *Prasad,* above n 5, at [39]–[40].

42 As referred to in *Leota v Parcel Express Ltd* [2020] ERNZ 164 at [35].

[91] For her part, Ms Service, counsel for the second defendant, also submitted that the plaintiffs' argument that there were similarities between this case and *Prasad* was ill-founded. She said the facts were clearly distinguishable. Fundamentally, this was because in *Prasad*, the Court had considered what counsel described as a triangular contractor arrangement, whereas the present litigation involved a triangular employment relationship. A range of other factual distinctions were also outlined.

[92] Before pulling these threads together, we comment briefly on two of the overseas judgments to which we were referred.

[93] In *Autoclenz,* the Supreme Court made statements about the need to assess the reality of the relationship. Those conclusions were significant in the UK context because the Employment Rights Act 1996 (UK) does not state explicitly that the real nature of the relationship is paramount – unlike s 6 of the Act.

[94] Subject to that acknowledgment, we are content to adopt the following statement about the case, as expressed by former Chief Judge Colgan in *Atkinson v Phoenix Commercial Cleaners Ltd*:[43]

> ... [Autoclenz] reaches the same broad conclusion as s 6 does in New Zealand [requiring] that courts must make a realistic assessment of the reality in all the circumstances of work performed in a working relationship upon which significant rights and obligations will depend.

[95] We have also considered the recent judgment of the Supreme Court in *Uber*. There the court emphasised that the relative bargaining power of the parties can lead to a situation where contracts are drawn to avoid important statutory employment protections.[44] The contractual documents in such situations may not be consistent with the real relationship.[45]

[96] Given the requirement of s 3 of the New Zealand Act to acknowledge and address the inherent inequality of power in employment relationships, these are not controversial propositions, though they are worth emphasising.

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43 *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19, [2015] ERNZ 10 at [13].
44 *Uber*, above n 40, at [76].
45 At [84]–[85].

[97] We think other overseas cases cited by counsel are of limited assistance. Many of these were considered by the full Courts in both *Ontrack* and *Prasad*; both those Courts noted in effect that different approaches have been adopted in different jurisdictions, as might be expected. Moreover, they are all entirely dependent on their own facts. We agree.

Conclusions as to s 6

[98] We have concluded that the following observations, about s 6, are of assistance in this particular case:

a) In determining whether there is an employment relationship between the applicants and IR, the real nature of the relationship must be assessed. In doing so, the Court is directed to consider all relevant matters, including any matters that indicate in reality the intentions of the parties. A statement that describes the nature of the relationship is not determinative. What is being assessed is the parties' true agreement. All relevant matters include the broad range of factors described in *Bryson*, as articulated earlier.[46] The analysis is intensely factual.

b) There is no indication that prior to the enactment of the Employment Relations (Triangular Employment) Amendment Act 2019, Parliament intended to rule out the application of s 6 to a labour-hire arrangement. An employee means "*any* person of any age employed to do *any* work for hire or reward under a contract of service". Section 4(2) describes "employment relationships", one of which is between "*an* employer and *an* employee employed by the employer". An employer means "a person employing *any* employee or employees". These definitions do not preclude the possibility of a person working for a third party.

c) In short, the section is broad and flexible and is well capable of being applied in circumstances where unusual working relationships may fall

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[46] *Bryson*, above n 28, at [31]–[32]; and see [62]–[65] above.

for assessment. As Parliament itself has stipulated, an enactment applies to circumstances as they arise.[47]

d) The following observations made in *Prasad*, albeit with regard to an issue as to whether the applicants were independent contractors or employees, are apt with regard to a labour-hire arrangement where an employee is engaged under an employment agreement with a hire company:[48]

> [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.
>
> ...
>
> [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.

We will return later to the question of whether *Prasad* is a factual precedent.

e) In this field, form may not trump substance. Section 6 has to be understood in light of the s 3 objects, and in particular, by acknowledging

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47 Interpretation Act 1999, s 6.

48 *Prasad*, above n 5. See also *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256 at [24] where the Court of Appeal considered that the judgment in *Prasad* reflected entirely orthodox reasoning and expressly approved para [98].

and addressing the inherent inequality of power in employment relationships.

f) Given the date of its enactment, the provisions of the Employment Relations (Triangular Employment) Amendment Act do not apply to the present case.

The parties' agreements

[99] In addressing the terms of the parties' agreements, we begin by describing the documents provided to the plaintiffs when they entered into work arrangements with Madison. As noted, these were their IEAs, job briefs, job descriptions and IR's Code. We consider each.

The IEAs

[100] All IEAs had a subheading; in three instances the subheading was "on hire temporary staff". On the face of it, these IEAs related to casual employment. The remainder of the IEAs bore the subheading "fixed-term"; these IEAs contained a statement that there were genuine reasons for the fixed-term nature of the arrangement, as well as a trial period provision.

[101] Each document stated that the agreement and the job brief established both the nature of the relationship between the parties and included the terms and conditions under which the individual would be employed by Madison.

[102] Each IEA made it clear that the employee was employed on a temporary basis to work on assignments for a client, who was not named in the document.

[103] Included in each IEA was a statement that Madison was a personnel consultancy which provided services to a third party, and that the worker would be employed on a fixed-term or casual basis to work on assignments for a specified term for the client.

[104] Each IEA provided that the conditions of employment contained in the agreement and that the job brief would come into force at the commencement date set

out in the job brief. The employment would continue until the termination date set out in the job brief, unless terminated earlier by Madison in accordance with the agreement.

[105] The agreement described standard terms, such as payment of wages by Madison based on completion of timesheets, provision for annual holidays, public holidays, sick leave, and bereavement leave, a requirement to notify Madison before accepting any employment or engagement elsewhere, how to resolve employment relationship problems with Madison, and a statement that the terms and conditions set out in the IEA and the job brief represented the entire agreement of the parties.

[106] "An employee declaration" stated that the employee acknowledged their employment would remain with Madison and was not one with the client, and that, prior to signing the agreement, a reasonable opportunity to seek independent advice had been given.

The job briefs

[107] The job briefs were similar in their format. The document began with a brief statement that the person would be employed by Madison pursuant to terms and conditions set out in an IEA and job brief, and that for the duration of the employment, the individual would work for IR.

[108] The "Main Duties" for contact centre workers were described as follows:

> Your specific duties are as set out in the position description provided to you, but will include undertaking voice contact and call resolution in the contact centre environment and other service-based activities, as appropriate and prioritised by the Client, in order to manage a temporary increase in customer demand. You will be required to undertake training for approximately 12 weeks.

[109] The document also described commencement and termination dates.

[110] Where a fixed-term agreement was to be entered into, the job brief stated:

> To provide specific services to the Client as set out in Main Duties above. Madison is required by the Client to help to manage a temporary increase in customer service demand.

...

> The termination date is when the Client expects to no longer need additional support to manage its customer demands, and therefore your services would no longer be required by Madison. However, other client needs will be assessed at this time, and possible future opportunities with IR or other clients will be discussed with you.

[111] In each instance, the document went on to describe location, hours of work, the extent of daily hours, remuneration, the possibility of hours being reduced or supplemented, and the notice period.

The job descriptions

[112] IR's job description for the CSO role was broad; it was to provide "end-to-end services to improve customer experience and long-term compliance and champion IR's customer-centric and intelligence-led culture".

[113] Key outcomes included providing customer service across a variety of channels and products, both proactively and reactively, so as to help customers; to prepare casework activity; connecting with Legal Services for legal enforcement to support long-term customer compliance and to work across IR to access technical specialists for the support of complex customer needs; and finally, to work in a networked way across IR and to use insights gained to develop solutions for customers. The document went on to describe specific requirements and capabilities.

IR's Code of Conduct

[114] The final document which the plaintiffs received at the outset was IR's Code.

[115] Under the MSA, personnel were required to acknowledge the Code, as well as health and safety, privacy, and tax secrecy requirements.

[116] The Code was introduced in 2008, and according to its text, updated in June 2016 to include a reference to the recently enacted Health and Safety at Work Act 2015. Its essentials are longstanding.

[117] It is comprehensive. It states that it applies to "all Inland Revenue employees – permanent, temporary, casual and fixed-terms (including workers sourced from

employment agencies)" and "also applies to external contractors or consultants working for Inland Revenue".

[118] The document contains onerous obligations, both on IR as employer, and on other persons bound by the document.

[119] There is controversy between the parties as to the significance of the various obligations for s 6 purposes, and whether it actually sheds light on the real nature of the relationship with IR. We shall consider this point more fully later.

Madison and IR documents

[120] There were a range of further documents, which the plaintiffs did not know about. We now deal with them.

The MSA

[121] The MSA recorded the scope of services which Madison committed to provide to IR. Those services related to the provision of personnel as described for in the SoWs and in sch 2. "Personnel" meant any employee, agent or representative of the Service Provider, that is, Madison. The company was also to provide "deliverables", which meant all documentation, software and other materials provided under sch 2 and any SoW.

[122] Schedule 2 contained this introductory statement:

> 1.1 Inland Revenue's Customer Services answers millions of calls each year and responds to an increased volume of electronic correspondence. It also proactively delivers other customer contact services. As Customer Services it is often the first point of contact for Inland Revenue's customers, Inland Revenue's role is to deliver a consistent experience for customers to promote tax compliance and ensure that customers receive correct information in a timely manner.
>
> 1.2 Inland Revenue has engaged the Service Provider to work with Inland Revenue in a long-term collaborative relationship to ensure the delivery of suitably trained and competent flexible resourcing to support Customer and Compliance Services functions providing advice and assistance to Inland Revenue's customers.

[123] The schedule went on to state that services would be provided under SoWs, the template for which was set out in another schedule. In a SoW, the expectations for the provision and management of personnel was to be described; it was emphasised that personnel were to be "appropriately and efficiently recruited, trained and on-boarded", so that they met the expectations and obligations of the MSA.

[124] The MSA and the schedule both emphasised that personnel would need to have certain attributes, and that they should be appropriately experienced, skilled and qualified.

[125] Madison was to be solely responsible for the selection and recruitment of personnel who would be assigned for the purposes of each SoW. Invoicing, fees, expenses and associated financial matters were defined. IR would pay an initial set-up fee, a monthly management fee dependent on the role and the number of personnel introduced by Madison. By way of example, a payment in respect of a CSO in training was to be $26 an hour, and following training, $29.25 an hour, both figures being GST exclusive. Madison could request a change in the fees at the anniversary date of the agreement.

[126] A further factor affecting the quantum of the fee was whether the assigned person was a trainee or had concluded their training and had become competent.

[127] IR's position is that the rates set out in the MSA were for the purpose of determining the fee payable under the contract; they did not dictate what Madison actually paid to its employees; that was said to be a matter for Madison to determine, and one in which IR had no involvement. However, Mr David Moore, Capability and Outcomes Lead at IR, said the MSA also contained a control mechanism to ensure that "resources" were being provided in line with market dynamics: he confirmed quarterly benchmarking of "wage rates" would take place.

[128] Provision was made for reporting by Madison to IR, and for regular review meetings between the parties. IR also said that as Madison was a member of the All of Government panel, there were government expectations as to employment standards adopted by external providers.

[129] We also mention the provision in the MSA for removal of personnel. If IR considered, acting reasonably, that any personnel was "unsatisfactory or unsuitable", IR could instigate a prompt process requiring Madison to replace that person.

[130] It is convenient to deal at this stage with the plaintiffs' submission that the MSA was no more than a recruitment agreement, by which Madison brokered the introduction of employees to IR. The word "recruit" was used in sch 2 of the MSA, but in context it referred only to the initial process of attracting candidates.[49] Madison was to have an ongoing role. This is different from the situation where a recruitment agency introduces an employee to an end user and has no further involvement. We find that in its terms, the MSA is not a document which provided only for Madison to "recruit and supply", as Mr Cranney put it.

[131] Nor is it correct to contend on the basis of the documentation that Madison was simply acting as an agent for the Crown. Both the MSA and the IEAs made it clear this was not the case. The MSA expressly excluded this possibility; and the IEAs stated the employer was not Madison's client, and would not become one with it.

Statements of work

[132] We turn next to describe the manner in which the SoW regime operated. By this means, IR provided for assignments regarding a specified piece of work. Each SoW included provision for a start and end date for that block of work, position title for the personnel required, and fee payable to Madison for the provision of those persons.

[133] Where changes were required to a SoW, a "restated" document would be negotiated between the parties. The Court is advised that where this occurred, the SoW would include a reference to a "workbook", which listed the individuals already covered by existing SoWs and the applicable period of the necessary work. The workbook was continually updated to reflect personnel changes.

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[49] Clause 3.1(ii) and 3.2(a).

[134] Seven SoWs were introduced in evidence. The period over which the plaintiffs worked spanned July 2018 to September 2019.

[135] The first and third plaintiffs were assigned by Madison under a SoW which provided for 12 CSOs undertaking voice contacts in a contact centre; this SoW covered the period 20 April to 31 December 2018 (the Voice SoW).

[136] On 25 October 2018, a restated SoW was agreed which provided for 382 CSOs and 83 CSAs. The first and third plaintiffs continued to work under this restated SoW; the second, fifth, sixth and seventh plaintiffs were assigned under this SoW, following an inception.

[137] A SoW relating to Working for Families tax credits and Child Support (Working for Families SoW) was established for 45 CSOs. The fourth plaintiff was assigned under this SoW (Working for Families SoW).

[138] The eighth plaintiff originally worked for IR via an agency hire entity that proceeded the MSA between IR and Madison. Then she was transferred to Madison and worked as one of 78 CSOs under a transition SoW (Transition SoW).

[139] These assignments coincided with the third release of IR's transformation programme, when each taxpayer's account for income tax and Working for Families was moved into IR's new tax and revenue technology system, START. Contact centres were obviously important in this period of transition.

[140] Each SoW stipulated the number of personnel that would be required; they also referred to invoicing rates as derived from the MSA. The work to be performed was briefly described as follows:

a) An initial focus on undertaking inbound voice contacts in the contact centre, and other service-based activities as appropriate and prioritised by IR on a temporary basis to manage increases in customer demand as a result of the Business Transformation (Voice SoW).

b) Working for Families tax credits and Child Support, again as appropriate and as prioritised by IR (working for Families SoW).

c) A broad CSO and CSA role job description and other service-based activities as appropriate and as prioritised by IR (Transition SoW).

[141] These documents also indicated that competency for a worker in training would be expected to be achieved after eight to 12 weeks. Hours of operation were also referred to. Standard service levels were as agreed in the MSA; performance and quality criteria were as expected in the CSO job description.

[142] Once a SoW had been negotiated and agreed, Madison gave notification of available work via a job board advertisement, or through its website. Applicants would then be contacted for an initial phone screen; after a while they were interviewed, references were obtained, and a probity check was undertaken. An IEA would be signed and related documents would be acknowledged.

Standard operating practices/Managing Madison employees

[143] IR's SOP document outlined for its managers the standard practices that were to operate between IR and Madison. In summary, reference was made to the roles and responsibilities of each party. It dealt with administration issues such as recruitment; onboarding and induction; offboarding with or without notice; and the process to be followed where an individual was offered a role (permanent or fixed-term) with IR; time reporting and invoicing; competency delegations and quality; hours of work; managing Madison personnel with regard to their personal tax affairs; conflicts of interest; investigation or incident employment relations issues, health and safety matters; and site visits.

[144] The SOP was developed shortly after the MSA was signed in March 2018 and was reviewed in March 2019.

[145] A second IR document, Managing Madison Employees was introduced in March 2019; it was described as an easy-to-read reference guide for IR team leads

engaging in working Madison employees; it expanded on the various concepts described in the SOP.

Analysis of the documents

[146] In considering the various documents, it is convenient to first deal with submissions made by the plaintiffs as to their validity.

[147] We start with the IEAs. In summary, Mr Cranney argued that the IEAs did not require or contemplate or permit any work being performed by the employee for Madison itself.

[148] On its face, the requirements of the IEA are clear. The employee would provide "services to the client to perform the work set out in the job brief". The job brief expanded on the nature of those particular services by stating, for example, that the worker would undertake certain defined duties. But it was clear from the documents that Madison would make the necessary arrangements and that each plaintiff was being employed by Madison to work on individual assignments for the client, as prioritised by IR.

[149] The IEAs also referred to the services provided by Madison to the third-party client. Although this particular type of service was not defined in each IEA, it was obvious that there was a separate arrangement between Madison and the client which would define the company's service. That was indeed the case under the MSA, as already discussed.

[150] In short, the agreement each plaintiff signed with Madison was consistent with the MSA obligations. Each plaintiff was to work as a Madison employee for the client, in consideration of which Madison would pay wages.

[151] The arrangements in respect of the plaintiffs were necessarily complex. They could not have occurred without Madison's involvement.

[152] We are satisfied that the reference in the IEAs to the provision of services by Madison to its client meant, on its face, that the candidate would work for Madison itself under the agreed regime.

[153] Next, Mr Cranney argued that the IEA arrangements were not "contractually possible". He said this was because each agreement would not come into force until the "commencement date" set out in the job brief and would run only until "the termination date set out in the job brief", unless terminated earlier.[50] He went on to say that there was no obligation of any kind requiring the worker to do any work for Madison and no right for Madison to require it to be done for it.

[154] It is clear from s 6(1)(b) that an employee includes "a person intending to work", a phrase which receives further definition in s 5, where such a person is one "who has been offered, and accepted, work as an employee". The Act thereby allows for the possibility of an IEA providing for intended work, as occurred here.

[155] The IEAs clearly related to temporary work, which is of course permitted under the Act, whether on a fixed-term or causal basis. It was not argued that relevant statutory criteria were not met.

[156] To the extent that the plaintiffs were contending that there was not the required reciprocity of obligations, and in particular an agreement by Madison to provide work, we are satisfied that the documentation supplied to the plaintiffs at the outset met this requirement; at the time of signing the IEAs, the plaintiffs were provided with a confirmation of a fixed-term job brief which stated the employment would take place as from a commencement date. This documentation was clear that if work was performed, payment would be made. We find that the documents signed or acknowledged by the plaintiffs, provided the necessary mutuality of obligations.[51]

[157] On the face of the documents we have reviewed, there were triangular arrangements between these parties. There was an overarching commercial agreement between IR and Madison. Separately, the plaintiffs signed documents which

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50 Clause 3.2.

51 As to which see Freedland (ed), above n 19, at 519.

acknowledged Madison as their employer, not Madison's client. The other documents provided to them endorsed Madison's status as their employer. On the basis of the agreed provisions, Madison became the plaintiffs' employer in each instance, not IR.

Intention to create legal relations

Plaintiffs' position

[158] We now consider whether the various parties intended to enter into legal relations, and if so, with whom. The necessary analysis requires consideration of what each party thought they were doing or had done when they contracted with each other.

[159] We start with the plaintiffs, about whom a great deal of evidence was led. This has accordingly been summarised in Appendix A to this judgment with regard to each plaintiff. The summary relates to the oral evidence given by, and about, each plaintiff, and the documentary evidence, particularly as summarised by Madison in its detailed TRISS records as kept for each individual.

[160] A careful review of this material provides a clear picture in each instance. We find that each plaintiff intended to enter into an employment agreement with Madison. In no instance did any plaintiff sign an IEA or acknowledge an associated document on the basis IR would be their employer; this was notwithstanding the fact that each plaintiff knew they would be working on tax tasks at IR.

[161] However, these conclusions do not determine the issue of identity of the employer from the plaintiffs' perspective. It is a factor which can be taken into account in that assessment. We must consider, as Mr Cranney submitted, that at the outset the plaintiffs had only the information provided in the job brief and job description as to the tasks they would be performing and the arrangements which would apply. They had not, to that point, engaged directly with IR.

[162] At that stage, their focus was on obtaining work. There was an inherent inequality of power, the effect of which was that if the plaintiffs wanted to work, they had no choice but to sign and acknowledge the documentation.

IR's position

[163] Next, we turn to the position of IR. On the face of it, the MSA and related documentation plainly indicates the organisation intended to be in a commercial relationship with Madison and that the employer of the workers introduced to it would be Madison and not IR.

[164] Mr Cranney submitted, however, that a contrary intention should necessarily be inferred when considering the issue of delegations under s 41 of the SSA because each plaintiff was in effect regarded as an employee.

[165] The context for this submission is that each plaintiff was provided with a carefully described delegation from IR on behalf of the Commissioner, when entering into their IEA with Madison. The delegations authorised the making of tax technical decisions, with the exception of those that were reserved for other roles as set out in a permissions matrix. This meant that while Madison employees received certain delegations, they did not receive the full range of delegations which would have been exercised by a CSO (or a CSA) who was an employee of IR itself.

[166] Mr Cranney submitted that it was unlawful and contrary to s 41 of the SSA for the Commissioner to delegate any of her functions and powers to the plaintiffs if they were not her employees. Section 41 relevantly provided:

> **41 Delegation of functions or powers**
>
> (1) A Public Service chief executive may, either generally or particularly, delegate in writing to a person described in subsection (1A) or (2A) any of the functions or powers of the chief executive under this Act or any other Act (including functions or powers delegated to the chief executive under this Act or any other Act), except that—
>
> (a) the delegation of functions or powers delegated to the chief executive by a Minister requires the prior written approval of that Minister; and
>
> (b) the delegation of functions or powers delegated to the chief executive by the Commissioner requires the prior written approval of the Commissioner.
>
> (1A) The following persons may be a delegate under subsection (1) or a subdelegate under subsection (2):
>
> (a) another Public Service chief executive:
>
> (b) a Public Service employee:

(c) an individual working in the Public Service as a contractor or as a secondee from elsewhere in the State services in relation to a function or power of the Public Service:

(d) the holder for the time being of any specified office in the Public Service.

...

[167] Mr Cranney referred to a business case which was prepared for the Commissioner on 26 April 2018 about the delegations provided to Madison workers. He relied on a passage in the document which stated that the capabilities of those persons were expected to be the same or similar as for permanent IR employees.

[168] However, the memorandum went on to state that "reserved permissions" would not be delegated to third-party employees. We infer from the document that it was intended a more restricted form of delegation would be provided to third-party employees, such as those introduced by Madison.

[169] The point that was being made in the business case was that the same level of service should be given by Madison employees and IR employees, although the latter would undertake a broader role.

[170] The instrument which delegated the powers of the Commissioner recognised this distinction by specifically listing those powers that would be delegated to Madison employees, and in a separate appendix, those that would not. We do not think this memorandum establishes the inference which the plaintiffs sought to draw from it.

[171] Mr Cranney also submitted s 41 was relevant as a matter of law. In effect, he submitted that by granting delegations to Madison workers, they were deemed to be employees. He referred to two particular cases to illustrate the point, which he argued demonstrate how statutory provisions may determine the current status of a worker.

[172] The first of those was *Challenge Realty Ltd v Commissioner of Inland Revenue*, a decision which was decided under the Employment Contracts Act 1991.[52] In assessing, in that instance, whether the claimants were independent contractors or employees, the Court of Appeal was particularly influenced by the statutory

[52] *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA).

framework of the Real Estate Agents Act 1976.[53] That framework required approved salespersons to be under the "effective control" of a licensed real estate agent. The control gave the agent broad oversight of a salesperson, irrespective of the amount of day-to-day control or supervision that was exercised in reality.[54] The Court regarded this factor as being a strong indicator of employee status in the particular circumstances.

[173] The second authority relied on is the recent judgment of the Supreme Court in *Uber BV v Aslam.*[55] Relevant for present purposes, Mr Cranney argued, was the Court's consideration of whether certain Uber drivers were workers as defined in s 230(3) of the Employment Rights Act 1996 (UK); that is, whether they had "entered into or worked under a contract to perform work or services" for Uber. The company's defence was there was no such contract. It asserted that any contract was with passengers, and not Uber.

[174] The Supreme Court referred to a "fatal difficulty" for Uber. It found it was illegal for a driver to accept a booking in London unless he or she holds a private hire vehicle operator's licence. The holder of the licence in this instance was Uber, not each of the drivers. If Uber's argument was correct, the entire arrangement was unlawful. The court concluded it was reasonable to assume, at least until the contrary was demonstrated, that the parties intended to comply with the law in the way in which they dealt with each other.[56] The Court held that once it was accepted Uber London was the licence-holder, the inevitable conclusion was that it had contracted with the passengers, and not the drivers.[57]

[175] Mr Cranney argued that in both these cases, courts had concluded that the statutory framework provided the answer to an assessment of the real nature of the relationships in question. Here, he argued, s 41 was a crucial aspect of the employment framework and resolved the question of identity of employer in each case.

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53 In particular ss 2(1), 3(1), 42 and 54.
54 *Challenge Realty*, above n 52, at 62–63.
55 *Uber,* above n 40.
56 At [46].
57 At [56].

[176] By way of response to these points, Mx Hornsby-Geluk submitted the plaintiffs were within the boundaries of s 41 of the SSA. She relied on a document produced by the State Services Commission in April 2014, which discussed the possibility of delegations being made to individuals working in the Public Service as a contractor or secondee. The document relevantly stated:

> In addition, there was no intention to distinguish between contractors acting personally and employees of contractors. While the meaning of the term "contractor" is ultimately a matter of interpretation, the policy intention was that it would carry the meaning widely understood within departments. The policy intention was that s 41(1A)(c) would cover both people directly engaged on a contract for service and those employed by a contractor (such as a consultancy firm) and deployed into the department.

[177] We have some doubts as to whether the apparent policy intention expressed in the April 2014 document is reflected in s 41(1A)(c). However, having regard to our view as to the relevance of the section, even on the basis contended for by the plaintiffs, it is unnecessary to rule definitively on the definition of persons who may fall within the boundaries of the section. Rather, the issue is resolved by considering the purpose of the section.

[178] Section 41 relates to how delegations may be implemented by a chief executive. It is a mechanism for the legitimate dispatch of the responsibilities of the office holder. It is not a provision which in and of itself determines employment status. In that respect, the two authorities relied on are distinguishable.

[179] We turn to the first of these, *Challenge Realty*. We find the concept of delegation under s 41 of the SSA is wholly different from the concept of effective control derived from several provisions of the Real Estate Agents Act 1976. All these provisions were key to an understanding of salespersons' employment status. By contrast, s 41 focuses on the modus operandi of a chief executive.

[180] Nor do we consider the second authority, *Uber*, is of assistance. It relates to the interface between wholly different labour legislation, and local transport licencing provisions. The Supreme Court held the parties should be regarded as having intended to comply with the transport licencing regime in the way in which they dealt with each other, unless the contrary was demonstrated. The same could not be said about the

circumstances of this case. A mechanical provision relating to the grant of delegations by the Commissioner in the course of her duties, although important, is not a compliance issue of the type considered in *Uber*.

[181] We also observe that if the plaintiffs' interpretation of s 41 were to be regarded as correct, the delegations were not correctly authorised. However, that circumstance could not lead to a conclusion that in reality the plaintiffs were employees of IR. It could only lead to a conclusion that the plaintiffs held unlawful delegations, because the Commissioner was not authorised to take the step she did.

[182] In summary, we are not persuaded the s 41 argument could lead to a conclusion that the Commissioner held a different intention from that which was recorded on her behalf in the MSA and related documents; or that she could be deemed as a matter of law to hold a fundamentally different intention from the clear intention recorded in those documents.

Madison's position

[183] Finally, we consider the position of Madison. Without doubt, that entity intended it would enter into legal relationships with persons who would become its employees, which it would introduce to IR, and with whom it would continue to have an employment relationship. It intended to have a related commercial relationship with IR.

[184] In summary, the documentation entered into by the parties clearly points to an intention on all sides that the plaintiffs would be employees of Madison and not IR.

[185] However, these findings are not the end of the issue because at the heart of the plaintiffs' case is the proposition that an analysis of the real nature of the relationship shows IR was in reality the employer. We turn next, therefore, to a consideration of that topic.

How the relationships operated in practice

[186] Again, the Court received a great deal of evidence from all parties as to how the relationships worked in practice. Before considering this issue with regard to each plaintiff, we summarise the main features of the relevant work arrangements, which, in the main, are not in issue.

Recruitment and induction

[187] Madison recruited personnel so as to meet the requirements of the agreed SoWs. IR was not involved in that process, or party to the negotiation of IEAs with individual plaintiffs. It is said it had "no visibility" of these documents, meaning this was a matter for Madison.

[188] Under the MSA, Madison was responsible for ensuring each plaintiff completed his or her pre-employment checks.

[189] Madison set up first-day instructions and kept in touch with each employee as they commenced their role.

[190] A thorough induction process was then conducted, led by an IR team lead or group lead. This included such topics as organising site access/ID cards, ensuring Madison employees applied for START access, presenting information regarding access to IR systems, and being provided with a delegations letter. They also completed standard modules relating to health and safety, the Code and security requirements.

Training

[191] Training was provided to each plaintiff on those tasks they were to undertake. Madison employees did not undertake each and every duty that was spelt out in the CSO job description. Hence, the training was more focused than the broad training given to IR employees. This distinction is evidenced by the training schedules for the

three persons who subsequently became employees of IR; they received more extensive training as IR employees, than when they were on assignment.[58]

[192] The following training was undertaken with Madison employees in their first four weeks:

a) In the first week, they were instructed in Frontline Foundation Learning materials;

b) In the second week, they undertook three days on telephone work with a "buddy" to familiarise themselves with the phone system; and

c) In the third and fourth weeks, they undertook further training in Frontline Foundation Learning.

[193] If the employee was to work on a particular area of IR's business, such as Working for Families, then they would be trained in that, and/or on any other relevant module.

[194] A further training subject concerned IR's Code. Integrity Assurance provided training on this topic. Mr Christopher Linton, manager of Integrity Assurance, stated that Madison employees were trained only on that portion of the Code which related to those employees. He said the training would be modified to reflect their circumstances. Thus, the portion of the training that referred to an employment investigation process reflected the fact that the process outlined in the Code would not apply to the trainees. Any internal investigation relating to a Code allegation against a Madison employee would be dealt with by Madison, as we will explain later in more detail.[59]

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58 Samuel Gregory, Keanu Head and Wendy Kain.

59 See below at [220]–[226].

Hours of work

[195] The time periods within which a particular class of work involving Madison employees were defined by SoWs. It was then up to Madison to offer its staff the opportunity to work within the window described in the SoW.

[196] Any request by IR for individual employees to work additional hours was referred to Madison; it would communicate with the employees stating a request had come from IR for additional hours; if a Madison employee was prepared to work those hours, Madison would inform IR accordingly. Those employees, however, had the right to decline to work such hours.

Work performed by the plaintiffs

[197] It is common ground the plaintiffs did not undertake the full scope of the CSO role. For instance, they did not work with other IR teams, as might be expected of a CSO. Whereas an IR employee could work "across a variety of channels and products" under the job description, the plaintiffs provided services only in respect of one channel (in most instances, voice work) and generally basic front-end customer queries, and possibly one other product or tax type. In short, they were not expected to demonstrate all the specific capabilities outlined in the CSO role description.

[198] The plaintiffs were supervised at IR by team leads within the CCS group. This included the maintenance of a proper workflow, and by providing technical guidance or access to IR's online tools when needed. The evidence was that only IR employees would have the technical knowledge to provide this guidance; Madison managers did not.

[199] Ms Samantha Rodgers, Operational Head for Contingent Labour at IR, said that performance and conduct issues were dealt with by Madison; leads or other IR staff did not have coaching conversations or engage with the employees regarding career development, leave or any other leadership conversations.

[200] Madison employees attended team meetings, but Ms Rodgers stated this was to ensure they received relevant and up-to-date information about technical matters, and where to seek help and guidance when working on IR sites.

[201] The team leads who gave evidence all emphasised that the primary focus of ongoing supervision by IR was on technical matters, which had to be given by that organisation.

Competency

[202] Competency of Madison employees was a requirement. Each had to sit a competency test, about 10 to 12 weeks into their assignment, an obligation which was explained by Madison to candidates at the outset. Once competency was achieved, those persons would be added to a monthly "quality check" spreadsheet which contained statistics as to calls made. As explained earlier the amount Madison could invoice for that person increased;[60] so too did their wage.

[203] Madison maintained a management system called "TRISS", a system which captured incoming and outgoing emails, and a record of all interactions with employees. The plaintiffs' TRISS records confirm that it was Madison which regularly addressed competency or performance issues.

Coaching and development

[204] Madison was also sent weekly performance data which included average handling time for voice calls, adherence to schedules and productivity percentages for non-voice tasks. A Madison business partner – in many instances this was Mrs Mandy Mella – would meet with a relevant team lead overseeing a particular Madison employee, prior to monthly one-on-one sessions which were usually held with those individuals. It was the Madison business partner's responsibility to discuss any areas of concern arising from the information provided by the schedule and team lead, and to decide whether further coaching should be undertaken; this option would then be discussed with the team lead involved.

[205] If necessary, a formal performance improvement plan could be established. If that required additional technical support, it could be requested from IR. Madison was responsible, however, for following through on this.

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60 See above at [125].

[206] It is evident that by contrast, the monitoring of performance processes for IR employees was direct, comprehensive, and different. The Court was told it involved IR's Whānake, which incorporates an element of development in the organisation as it moves to a new culture under the Business Transformation Project. In that context, IR employees are required to establish performance/development priorities, recorded in a document entitled "My Plan". The plaintiffs were not monitored under these procedures.

Time reporting

[207] Madison employees were required to complete timesheets in a Madison portal and in MIRI, IR's time recording system. Madison would subsequently send timesheet summaries to the relevant IR team lead who would either approve or reject/return the timesheet.

[208] Madison would then, on the basis of this information, submit an invoice to IR. The calculation in the invoice would be based on the appropriate rates contained in the MSA.

[209] The relevant schedule included a column entitled "Hourly Rate to Personnel". Mr Bennett, Chief Executive Officer of Madison, said that although the figure shown for each designated position became the basis of the calculation, Madison's fee had to cover not only the rate which Madison was paying an individual employee when working for the hours Madison had agreed with IR to service, but also, for example, hours worked by a Madison employee which fell outside the limits of a given SOP. For example, Mr Bennett said Madison did not receive a full reimbursement for all entitlements it was paying under the Holidays Act 2003.

[210] Although the foregoing explains how Madison was paid under the MSA, it is the case that the payment of wages, subject to any necessary deductions such as PAYE, was a separate step undertaken by Madison. It maintained its own payroll. It is unduly simplistic to say it simply passed on to its employees what it was paid by IR for the services Madison provided, including the provision of personnel.

Annual leave

[211] If a Madison employee wished to take annual leave, that person was required to make a relevant request directly to Madison.

[212] If a Madison employee requested leave from an IR team lead – which did occur sometimes – they were referred back to Madison.

[213] Madison consultants, however, discussed employees' leave requests with IR, so they could ensure business needs were met, but the decision as to whether leave is granted or not was up to Madison.

[214] This requirement was spelt out in the MSA. Madison was required to provide at least five weeks' notice of annual leave absences, where possible, so IR could make suitable cover arrangements.

[215] A different process was followed with regard to IR employees. If unwell, they were required to contact their team lead, and/or an "absence line" to advise they would not be at work. Additionally a "welcome back" conversation was held, which did not occur with the plaintiffs when employed by Madison.

How the Code of Conduct operated

[216] As explained earlier, the Code was comprehensive. It was stated as applying to all IR employees, whether permanent, temporary, casual and fixed-term, including workers sourced from employment agencies; it also applied to external contractors or consultants working for IR.

[217] Mx Hornsby-Geluk acknowledged that the language could have distinguished more clearly between IR employees and other workers. However, the reference to "workers sourced from employment agencies" as opposed to "contractors" drew a distinction between recruited employees on the one hand and contractors on the other (where agency employees are assigned through a contracting agency). Mx Hornsby-Geluk also submitted that regardless of any potential ambiguity, the wording did not lead to any actual confusion on the part of the plaintiffs as to their employment status.

[218] As already noted, most plaintiffs were trained comprehensively on aspects of the Code, particularly those relating to secrecy of tax information, and health and safety issues. This was as stipulated in the MSA. Modules that did not relate to Madison employees, for instance, as to gifts and the use of motor vehicles, were not the subject of training. We have already referred to the different training that was given about integrity issues.[61] The document contained a comprehensive statement of the obligations on the Commissioner to be a "good employer", which were outlined in a series of "commitments".

[219] We will refer to the issue as to whether those arrangements caused any confusion later when assessing the circumstances of each plaintiff.

Managing performance/behaviour

[220] As recorded earlier, Madison's performance expectations were set out in relevant SoWs. They provided that Madison was to manage its employees to reach competency within an expected timeframe, to reach minimum work standards. If a team lead was concerned about a Madison employee's performance, they were to engage with Madison directly to discuss the issues. If minimum standards were consistently not being met, the consultant will establish a performance plan with the employee and provide regular updates.

[221] IR shared some performance data with Madison so these processes can take place. This included such measures as adherence to rosters, average handling times of contacts, and as to productivity and quality.

[222] These processes were different from those which applied to IR staff, where performance issues were dealt with directly by the relevant team lead.

[223] As also mentioned, complaints or concerns by IR could be raised, either from internal or external sources, with the Integrity Assurance team which was responsible for the management and independent oversight of these matters. This included any suspected or alleged Code issue.

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61 See above at [194].

[224] A complaint would be logged, triaged and assessed to determine whether on the face of it a Code provision may have been breached, and what initial action might be required.

[225] In the case of a Madison employee, any legitimate concern involving a potential breach of the Code would be referred to Madison to address directly, a process which was governed by provisions of the MSA. If criminal activity was involved, the matter would be referred to Police.

[226] By contrast, where a complaint involved an IR employee, a range of approaches was possible. These included such options as performance management, providing information to the employee's manager to enable other processes to be followed, initiating an employment investigation, or referring the employee to an outside agency such as the Police.

Resignation/ending an assignment

[227] Each IEA provided that the employment relationship could be terminated by either party giving notice in writing to the other. An employee wishing to cease their relationship with Madison could give written notice to that entity.

[228] This requirement was also referred to in the "Managing Madison Employees" document and the related SOP. Both these documents spelt out the necessary practices for "off-boarding". These were the steps which a Madison consultant would need to take, including reminding the employee that their obligations to maintain secrecy under the TAA would continue after the conclusion of the assignment. That was an obvious IR responsibility.

[229] As noted, the MSA also provided that if IR, acting reasonably, considered any personnel were "unsatisfactory or unsuitable", then Madison could be required to replace that person, and it would do so at its own cost, and in any event within five business days.

[230] Mrs Mella stated approximately 1,000 personnel were assigned to IR from 2018. Only two were removed; one for not satisfying tax check requirements, and the

other in circumstances of fraud. Neither of these persons is a plaintiff in this proceeding.

Social gatherings/network groups

[231] Madison employees were invited to participate in social activities that occurred on IR premises from time to time. There was some attempt to maintain boundaries, as between IR and Madison.

[232] Examples were given. The Commissioner hosted a morning tea to recognise the efforts of those who were working in a busy contact centre. This was first discussed with Mrs Mella from Madison. On another occasion, Christmas lunch was attended by Madison employees and IR employees. IR paid a small subsidy, but Madison employees were expected to make up the time. In another example, employees of Madison based in Palmerston North attended a bowling/pizza night that was jointly arranged with IR; Madison paid for its employees to attend.

[233] Madison employees also undertook their own activities with Madison, including after hours.

[234] They were not permitted to attend IR network meetings during time invoiced to IR, although they could attend out of work hours. An example related to an event which occurred in Whāngarei as an aspect of Maori Language Week. It was explained to Madison employees, many of whom were of Māori descent, they could not participate in work time. Mrs Mella dealt with this issue by applying leave arrangements for any time away from pre-arranged work.

Monitoring the relationship

[235] As already mentioned, monitoring of the foregoing arrangements was required under a schedule of the MSA devoted to this topic.[62]

[236] Mr Moore stated that as a result, quarterly contract performance and strategic review meetings took place with Madison which included operational management,

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62 See above at [122]–[128].

senior business management, and commercial management. These practices were verified by memoranda recording the contents of such meetings.

[237] IR reminded its team leads that Madison workers were at no time to be regarded as IR employees.

[238] One particular example of these processes related to a meeting held on 12 July 2019. It was argued for the plaintiffs that the meeting demonstrated a lack of robust policies and procedures, and a concern that managers were not observing the necessary distinctions.

[239] The Zoom meeting was held soon after the PSA wrote to the Commissioner. As noted earlier, it was asserted that persons introduced by Madison were in reality in an employment relationship with IR. We infer that the meeting with team leads was a reaction to the PSA letter.

[240] A range of topics were discussed with IR staff, which served to confirm the manner in which it was expected Madison employees would be treated. The topics included leave, additional hours, the determination of competency, how SOPs were working, the operation of groups and social activities, and the importance of not discussing with Madison employees particular aspects of their employment relationship, as may have been raised by PSA or others.

[241] We do not think this was an attempt to alter the way in which Madison employees were being managed; rather, the arrangements that had existed throughout were reinforced.

[242] This was confirmed by Ms Vivian Reid, Team Lead in Palmerston North, who said that what was being discussed was what was already happening in the Palmerston North Contact Centre.

[243] At a more general level, we are satisfied there had been regular monitoring and education of team leads including via a roadshow document which explained the Managing Madison Employees document. This was plain from the evidence of team

leads. For example, Ms Jacqui Sherlaw stated it had been made clear to her that the team she was leading consisted of Madison employees; she was to make sure they were doing what they needed to do and the only support she was to provide was in a technical capacity. She said this was also made clear to the Madison employees and was not there to perform any of the broader management and supervisory functions she would perform for IR employees.

The position of each plaintiff

[244] Detailed evidence as to the reality of each of the plaintiffs' employment relationship was given by each of them, their team leads, and Mrs Mella; the TRISS records were also relevant to this issue. We have summarised this evidence in detail in Schedule B.

[245] Earlier, we referred to the fact that when the plaintiffs signed their IEAs and acknowledged associated documents, they had limited information as to the tasks they would perform and the arrangements that would apply.[63] We are satisfied that once they commenced work at IR, they were not, and could not, have been in doubt as to who in reality was the employer: Madison, not IR. It was also clear that each plaintiff was party to a labour-hire arrangement. There was no confusion as to status, whether as a result of the language used in the Code or otherwise. We are also satisfied that in each instance, the way in which the employment relationship operated in practice was consistent with the various documents which governed the relationship and was in accordance with the practices outlined in this section of the judgment.

Summary of these factors

[246] Standing back, we consider the evidence establishes that, in the various respects identified, considerable efforts were devoted to respecting the difference between IR employees and Madison employees who worked at IR. The plaintiffs' work was more confined than those of IR employees in multiple respects.

[247] At this stage, we conclude that the factors just described do not point to an employment relationship with IR having regard to how the plaintiffs were treated and

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63 At [161].

managed. This differed in significant respects from how IR staff were treated and managed. The various factors we have reviewed, whether considered separately or cumulatively, support this provisional conclusion.

The common law tests

Control test

[248] The control test is a common law test often used to determine whether a worker is an independent contractor or an employee, where a significant degree of control by a party may well point to employee status though this will depend on the factual matrix.[64]

[249] That of course is not the issue here; rather, we are concerned as to which of two entities is the correct employer – noting that it is not contended that both Madison and IR were joint employers.

[250] It has long been the case that control factors have to be considered in the particular context.

[251] Control may in fact be a necessary component of a working relationship, whatever its composition, so that this consideration is not a reliable indicator as to the identity of the workers' employer; or where the issue is one of status, namely, whether the individual is a contractor or employee. So, in *TNT Worldwide Express (New Zealand) Ltd v Cunningham*, the Court of Appeal emphasised that there are circumstances where a degree of control is inevitable for the running of a business, so this factor cannot necessarily be regarded as decisive.[65]

[252] Here, the Commissioner held onerous responsibilities for the maintenance of the integrity of the tax system – regardless of the status of the persons or entities she engaged to perform the relevant functions.

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64 For example, *Clark,* above n 30.

65 *TNT Worldwide Express (New Zealand) Ltd v Cunningham* [1993] 3 NZLR 681, [1993] 1 ERNZ 695 (CA) at [714]. This statement was more recently approved by the Court in *Leota*, above n 42, at [46]–[47].

[253] Under the SSA, the Commissioner held broad powers as to how to carry out her statutory functions, responsibilities and duties.[66] These plainly included the power to employ, or contract, staff or entities; she was at liberty to exercise her discretion as to who she engaged to fulfil her statutory obligations.

[254] It was also argued for the plaintiffs that the control exercised by Madison was a façade because in reality IR was making all the key decisions as to employment issues, as well as those relating to tax tasks. Mr Cranney submitted Madison was operating under the guise of pseudo employment agreements, and that there was no real employment relationship. He relied on observations made by a leading author, that all common law tests and factors for distinguishing employment for other work arrangements are susceptible to manipulation; and that the Court must be wise to such stratagems.[67]

[255] In our view, there was no charade. Whilst Madison needed to have regard to IR's business needs as notified to it regularly by the organisation with regard to each plaintiff, we are satisfied that nature of the control exercised over the Madison employees was consistent with a genuine labour-hire arrangement where day-to-day tasks sit with a host organisation.

[256] Control was shared between each entity. As Ms Service submitted, the control exercised by IR was over the tasks which had to be performed. She said Madison exercised control over the employment relationship, which was broader than the tasks performed. This is a valid distinction.

[257] In the result, control factors are not dispositive one way or the other; they are neutral.

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66 State Sector Act 1988, s 34(2).

67 Freedland, above n 19, at 331. Approved in *Leota*, above n 42, at [37].

Integration test

[258] Where there is a status issue as to whether an individual is a contractor or employee, it can be useful to consider whether the person was part and parcel of or integrated into the enterprise of the work operation.[68]

[259] As would be expected, tasks carried out by the plaintiffs were part and parcel of IR's tax responsibilities. This was inevitably the case, whatever the putative status of a worker engaged by IR in those roles.

[260] The integration test is not, however, solely interested in the nature of the work being performed. It can also take into account factors such as the duration of the work,[69] training and reporting requirements,[70] and the practical operation of the business relationship agreed to by the parties.[71]

[261] As noted, Madison was contracted to provide workers for peak tax periods, or in other instances, when there was a particular need for their services; their assignments to IR were accordingly limited. It is plain from the documents reviewed earlier, that IR went to significant lengths to maintain a distinction between its employees and those provided by Madison. This included excluding them from IR staff meetings and leaving responsibility for the day-to-day administration of their employment to Madison. The degrees of separation maintained between the IR staff and those provided by Madison were reflective of the business relationship which had been agreed. They were not fully integrated into IR's operations. They worked only when required; and when they did, they were not treated as if they were fully-fledged IR employees.

[262] The result is that, while the nature of the work performed is part of IR's core operation, the plaintiffs were not an integral part of IR's operations but instead provided supplementary resourcing during busy periods.

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68 *Challenge Reality,* above n 52, at [65].
69 *Noble v Ballooning Canterbury.com Ltd* [2019] NZEmpC 98 at [116].
70 *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.
71 *Cardy Business Ltd v Bizaoui* (2005) 2 NZELR 245 at [49].

[263] It is also the case that the plaintiffs were integral to Madison's business operation. This factor is not binary, and does not lead to a conclusion that the plaintiffs were employed by IR.

Fundamental test

[264] The final common law rubric we address is the fundamental test; that requires consideration of whether the person was in business on their own account.[72] Since we are not concerned with the question of whether the subject individuals were contractors, this test is of no assistance.

Other matters

Bypassing of employer responsibilities

[265] Mr Cranney developed a submission as to the general purposes of the SSA, pointing out that this is to promote and uphold a state sector system that is imbued with a spirit of service to the community; operates in the collective interests of government; maintains appropriate standards of integrity and conduct; maintains political neutrality; is supported by an effective workforce and personnel arrangements; meets good employer obligations; is driven by a culture of excellence and efficiency; and fosters a culture of stewardship. He noted that these obligations were reflected in the Code to which the plaintiffs all agreed.

[266] As noted earlier, the plaintiffs relied on the publication and appointment on merit provisions found in ss 60 and 61 of the SSA. It was pleaded that the "appointment and mass appointment of persons" was contrary to provisions of the SSA, requiring IR to notify vacancies and requiring IR to give preference to the person best suited to the position.

[267] Mr Cranney argued that by deliberately recruiting and then managing workers via a third party, significant state sector obligations were bypassed. He submitted that despite being a core state actor, IR was able to achieve the benefits of an employment relationship, that is, full control and integration, without incurring any employer

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72 *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [40].

responsibilities either under the Act or the SSA. He said that IR thereby avoided the onerous obligations that arose under both of these statutes by the mechanism which was adopted. This was, he argued, a factor which should be taken into account in assessing the real nature of the relationship.

[268] We agree that these considerations might be relevant, particularly if the legal framework set up by an agency creating recruitment services and the host organisation was not genuine.

[269] There are, however, several reasons as to why we are unable to accept this submission. First, as already noted, the SSA recognises that the Commissioner as Chief Executive has a general power to contract: the MSA was accordingly a permissible alternative to the direct employment of staff. It was legally permissible for IR to enter into the arrangements it did.[73]

[270] There is nothing in the evidence to suggest that IR did not act in good faith. Moreover, IR managers were not challenged on this basis when giving evidence.

[271] IR also proceeded on the basis it was acting in accordance with the All of Government standards and that Madison was a member of the panel of available providers. We infer from this evidence that government itself has accepted arrangements of this kind.

[272] We have also determined to this point that a careful arrangement was set up between Madison and IR via the MSA and related documents, and that all parties then acted in accordance with those arrangements with the agreed boundaries being acknowledged.

[273] Nor is the present situation one where the plaintiffs were devoid of the broad range of statutory protections which apply to all employees under the Act.

[274] This includes the obligation to act in good faith as is now enshrined in s 4 of the Act. This arguably is an expansion of the statutory good employer obligations

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[73] See above at [253].

under the SSA which applied to IR's own employees.[74] The Madison employees had the advantage of all employment-related protections.

[275] Some plaintiffs felt they were working under inferior terms and conditions, whether compared with casual or permanent IR employees. Whilst this generalised assertion was made, no accurate comparative evidence was led on this topic, except to the effect that the plaintiffs worked half an hour longer per day than did IR employees. This is not a circumstance which could tip the balance in favour of the plaintiffs' argument.

[276] In any event, the plaintiffs were members of a union, able to bargain collectively, a fact which was recognised by the PSA when it issued its notice of bargaining.

[277] The plaintiffs were not, in our view, vulnerable employees open to abuse of the kind which features in some s 6 cases.[75] Nor do we accept the submission that the plaintiffs were deprived of all but the most basic of employment rights.

[278] In short, the fact that the arrangements in the present case were genuine, coupled with the protections which the plaintiffs obtained as employees of Madison, mean that this is not a case where it is appropriate to conclude that there was a deliberate attempt to bypass the obligations and protections of the Act or of the SSA whether having regard to ss 60 and 61 or otherwise, and that the real relationship was not as contracted.

Wages Protection Act 1983

[279] The plaintiffs also claimed that the MSA was unlawful because the payment of fees by IR under that document amounted to an unlawful premium which constituted a breach of s 12A of the Wages Protection Act 1983.

[280] The section provides:

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74 See *Coy v Commissioner of Police* [2015] NZEmpC 35, [2015] ERNZ 527 at [47]; and the advantage of the collective rights bestowed by the Act.

75 For example, *Prasad*, above n 5; and *Leota,* above n 42.

12A No premium to be charged for employment

(1) No employer or person engaged on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or is received from the person employed or proposed to be employed or from any other person.

[281] The plaintiffs submit that the margins Madison received from IR in respect of the plaintiffs' assignments were premiums.

[282] However, as Mr Cranney accepted at the hearing, before consideration could be given to the section, the identity of the employer must first be determined. The section itself does not assist in the resolution of that issue.

[283] We therefore place the plaintiffs' arguments in that regard to one side.

Prasad

[284] We return now to Mr Cranney's strong submission that there are persuasive parallels between the facts in *Prasad*, and those of this case; and that this Court should follow the reasoning adopted in that court.

[285] We do not accept this submission. Ms Service provided a useful comparative table between *Prasad* on the one hand, and the facts in this case on the other. It is worth summarising the elements of that table.

[286] In *Prasad*:

- the Court considered arrangements on the one hand and an employment arrangement on the other;

- there was an absence of employment rights for workers and no union representative.

- there was unclear documentation; so too was the work arrangement: it was of indefinite duration.

- the host ultimately questioned the legitimacy of the triangular contractor arrangement;

- the labour-hire agency had no engagement with workers on assignment;

- the workers were required to work long hours and were at risk of being taken advantage of;

- the labour-hire agency's model was not transparent; and

- the working relationship was terminated by the host.

[287] On the other hand, in the present case:

- the workers were unquestionably employed under IEAs;

- employment entitlements were met by Madison, including the right to bargain;

- the documentation was clear from the outset when it was agreed;

- the work was clearly defined;

- the plaintiffs were in substance treated as Madison employees, as was intended;

- neither Madison nor IR doubted the real nature of the relationships that had been set up;

- Madison regularly engaged with its employees on assignment;

- hours were well managed;

- Madison's labour-hire model was transparent;

- IR knew Madison's margin and required Madison to ensure all legal obligations were met; and

- workers submitted their resignations to Madison or their fixed-term of employment expired in line with its terms.

[288] We have already referred to the finding made in *Prasad* that the outcome of a s 6 analysis may depend on where a particular case sits on the spectrum. This is a case where the "arrangement and obligations, rights and roles of each party is well understood and agreed at the outset, and the work was provided on a supplementary and temporary basis".[76]

[289] In assessing the real nature of the relationship, the search is to ascertain the true intentions and expectations of the parties, not only at the inception of their arrangements, but if appropriate, as time goes by.[77]

[290] We are satisfied that the expectations of all parties were met in this case, when the range of factors we have referred to are considered.

Conclusion

[291] In each of the eight instances we have been required to consider, we are satisfied that in reality, IR was not the employer.

[292] We find that a consideration of all relevant matters confirms the intention of those involved was to enter into a labour-hire arrangement, where Madison employed each plaintiff under an overarching commercial agreement with IR to introduce those persons to IR, and to be involved in the ongoing management of their employment relationships.

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[76] *Prasad*, above n 5, at [92].

[77] *Protectacoat Firthglow Ltd v Szilagi* [2009] EWCA Civ 98, [2009] ICR 835 at [50]; cited with apparent approval by the Court in *Autoclenz*, above n 40, at [30], and in *Prasad*, above n 5, at [80].

[293] How each relationship operated in practice was consistent with the terms of the agreement which Madison entered into with the plaintiffs on the one hand, and with IR on the other. Genuine labour-hire arrangements were entered into.

[294] The applications for declarations by the plaintiffs are accordingly dismissed.

[295] Finally, costs. This issue should be discussed between the parties in the first instance. If agreement cannot be reached, any relevant application should be filed and served within 21 days, with responses given 21 days thereafter.

B A Corkill
Judge
for the full Court

Judgment signed at 12.15 pm on 14 May 2021

Schedule A

Evidence as to whether the plaintiffs intended to enter into an employment relationship with IR

Introduction

1. This summary is derived from evidence given by each plaintiff, from team leads, from Madison witnesses and from comprehensive TRISS records maintained by Madison.

Mr Keanu Head

2. Mr Head applied for a CSO role via Trade Me Jobs in June 2018.

3. He was phone-screened by a Madison staff member on 20 June 2018. On that occasion, he was told the role involved working at IR at its Palmerston North office. His brother had previously worked at IR, so he said he had some insight as to what the role would be like. He subsequently attended a Skype interview and completed test material online.

4. He was then sent an employment agreement, which he signed electronically on 27 June 2018. The IEA was described as "On-hire Temporary Staff" and stated he would be employed by Madison to work on a temporary basis on assignments for a third-party client. In doing so, he placed a tick in a box confirming his employment would be with Madison and not with its client.

5. He confirmed in evidence that he understood that declaration to mean that Madison, and not IR, was his employer and that this situation would persist for the duration of his assignment.

6. He also confirmed he intended to be bound by the terms of the agreement.

7. He was sent his first job brief on 22 June 2018. That brief included the statement "as you know, you are employed by Madison to work on assignments for clients". Mr Head confirmed that he accepted this job brief.

8. Several months later, on 13 September 2018, Mr Head's assignment was extended; at that point he was sent another job brief. He returned a signed copy a few days later. It contained the phrase: "As you know, you are employed by Madison to work on assignments for clients". He confirmed in evidence that at the time of entering into this job brief, he knew he had been employed by Madison to work for IR.

9. In April 2019, his job brief was again extended. He agreed to the terms of the brief. The document confirmed he would be employed by Madison for the duration of his employment, and that he would work for the client as set out in the job brief. He accepted again that he understood Madison was employer and not IR.

10. In summary, on two occasions in the course of his employment with Madison, Mr Head formally reconfirmed his understanding and intention to be employed by Madison, and to work on assignments with clients.

11. We are satisfied that at the time of signing the various documents, Mr Head intended to be in an employment relationship with Madison. He did not intend to enter legal relations with IR as employer.

Mr James Wright

12. Mr Wright applied for a CSO role via Madison's website on 20 December 2018.

13. He said at the time he applied, he knew the role would be with a government department, which he suspected was IR. He was phone-screened on 10 January 2019, when he was informed the role was with IR at the Wellington office. Then he was interviewed and sent a request to complete a pre-employment test.

14. On 11 January 2019, Mr Wright signed an IEA which stated Madison was employing him on a fixed-term basis to work on assignments of a specified term for a client. In signing it, he accepted that he entered into an IEA containing the declaration which confirmed his employment was with Madison and not its client. He confirmed online he intended to be bound by its terms. He understood there would be specific tasks which would need to be completed by the third-party agency, and he was employed by Madison to complete those tasks on behalf of that agency.

15. He was also asked to re-familiarise himself with the agreement prior to starting on his first day.

16. He was offered the role on 19 January 2019 and sent the "Confirmation of Fixed-Term Job Brief" which again confirmed he would be employed by Madison on a fixed-term basis; and that for the duration of his employment he would work for the client as set out in the job brief.

17. Mr Wright said that when he signed the job brief, however, he did not expect to be working for IR, but rather expected to be doing tasks on behalf of Madison for IR; nor did he expect to be undertaking the same tasks as IR employees.

18. We are satisfied that at the time of signing the various documents, Mr Wright intended to be in an employment relationship with Madison. He did not intend to enter into legal relations with IR as his employer.

Mr Samuel Gregory

19. Mr Gregory applied for a CSO role at a government department via Trade Me Jobs on 4 June 2018. Subsequently, he completed test material for Madison. Then he was phone-screened on 18 June 2018; he was informed at that time the role was with IR at its Palmerston North office.

20. Then he entered into an IEA described as "On-hire Temporary Staff". It stated the employee was employed on a temporary basis to work on assignments for a third-party client. He completed the document electronically and confirmed that his intention, when doing so, was to accept the terms and conditions set out in the document. This included the declaration which has been referred to earlier. He was provided with details of the assignment in a confirmation of job brief on 22 June 2018, which he accepted.

21. He reconfirmed his intention to be in an employment relationship with Madison when his job brief was extended in September 2019. He did this by accepting the job brief which confirmed he was employed by Madison, to work on assignments for clients. The extension was to take effect from 9 April 2019.

22. We are accordingly satisfied he intended, on two occasions, to enter into a legal relationship where Madison would be his employer. He did not intend to enter legal relations with IR as his employer.

Ms Rebecca Langford

23. Ms Langford applied for a CSO role at a government agency; via Trade Me Jobs. On 17 October 2018, she was phone-screened, during which she was told the role was with IR at its Takapuna office. She was sent a link to complete tests and was then interviewed by Madison at its premises later that day.

24. She then accepted a fixed-term role with Madison on 30 October 2018, stating in evidence she understood the agreement and intended to enter into it. Her IEA was described as "On-hire Temporary Staff" and that she would be employed by Madison on a temporary basis to work on assignments for a third-party client.

25. She accepted a confirmation of job brief outlining the details of her role. She said, in her evidence, that she understood the terms of the job brief as they were set out in the document. This included an acknowledgment that she would be employed by Madison on a fixed-term basis, pursuant to the job brief.

26. We are satisfied Ms Langford intended to enter into a legal relationship, where Madison would be her employer; she did not intend to enter legal relations with IR as her employer.

Ms Ashleigh Crichton

27. Ms Crichton applied for a role with Madison through SEEK Job Search in late 2018. She then undertook a screening process with Madison by phone when she was told the role was with IR at its Palmerston North office; she then attended an interview on 29 October 2018. .

28. At the same time, she signed an IEA, described as "On-hire Temporary Staff", and that she would work for Madison to work on assignments for a third-party client. In it she acknowledged that her employment was with Madison, which would not become one with that of the client; and that she intended to be bound by the agreement.

29. She said she signed the document to get the job, because she was looking urgently for work; she may not have read the declaration "word for word". But she acknowledged she knew at that point in time she was entering into an employment agreement with Madison.

30. We are satisfied she intended to enter into a legal relationship with Madison as her employer; she did not intend to enter legal relations with IR as her employer.

Ms Tamara Evans

31. Ms Evans applied to Madison for a CSO role on 18 October 2018 when she was told the role was with IR at its Dunedin office.

32. She was phone-screened by Madison the next day, and then sent online testing and application forms. She was interviewed by Madison on 30 October 2018 and offered the CSO role by phone on 2 November 2018.

33. Three days later, she was emailed a confirmation of job brief, and separately a "Fixed Term Individual Employment Agreement". It said the employee was employed by Madison on a fixed-term basis to work on assignments of a specified term for a third-party client.

34. On 6 November 2018, the agreement was duly signed, which included a declaration which acknowledged her employer was Madison, and that it would not become one with the client.

35. She understood subsequently that by signing the document, she agreed to its provisions.

36. We are satisfied Ms Evans intended to enter into legal relations with Madison as her employer. She did not intend to enter legal relations with IR as her employer.

Mr Dylan Crook

37. Mr Crook applied for a CSO role with Madison via Trade Me Jobs in October 2018. He completed the required testing. On 6 November 2018, he was screened and told the role involved work at IR's Hamilton office. He was then interviewed by Madison on 8 November 2018.

38. After this, he was sent a fixed-term employment agreement; a covering email emphasised that it was important he understood he was employed by Madison and not IR.

39. The IEA stated the employee was employed by Madison on a fixed-term basis to work on assignments for a specified term for a third-party client.

40. He completed the document, including the declaration as to the fact his employment would be with Madison and would not be or become one with the client.

41. We are satisfied that Mr Crook intended to enter into legal relations with Madison as his employer. He did not intend to enter legal relations with IR as his employer.

Ms Wendy Kain

42. Ms Kain applied to be employed by Madison following a transition from her previous employer, Kelly Services Ltd, on 28 March 2018. At the time of the transition, she said she understood Madison was to become her new employer. She knew she would be working at IR's Whangarei office, as she had previously.

43. On 10 April 2018, she received an IEA from Madison titled "On-hire Temporary Staff". It stated the employee was employed by Madison on a temporary basis to work on assignments for a third-party client. She signed the document electronicnally and returned it. She accepted that at the time of signing the agreement she intended to be bound by its terms and conditions. That included the declaration that the employment was with Madison, and would not be, or become one with, the client.

44. Her original term of employment was extended, and this was discussed with her by Madison.

45. She was then sent, and entered into, a fixed-term IEA and confirmation of job brief, by signing it on 17 March 2019, approximately a year after joining Madison. It contained a statement that the employee was employed on a fixed-term basis to work on assignments for a specified term for a third-party client. She again accepted, at that point, Madison was her employer.

46. We are satisfied that on the two occasions when Ms Kain signed IEAs, she intended to enter into legal relations with Madison as employer. She did not intend to enter legal relations with IR as employer.

Schedule B

Evidence as to how the employment relationship of each plaintiff operated in practice

Introduction

1. This summary is derived from evidence given by each plaintiff, from team leads, from Madison witnesses and from documents including the comprehensive TRISS records maintained by Madison.

Mr Keanu Head

2. Mr Head was a Madison worker for 12 and a half months – from 22 July 2018 to 29 September 2019, at which point he became an IR employee.

3. There were multiple communications between Madison and Mr Head over the course of his relationship. These were contained in emails, and in records of one-on-one meetings with a Madison business partner from time to time. One of these meetings included coaching and feedback regarding "adherence", which included maintaining timing expectations and recording these in IR's roster.

4. Mr Head described the initial training he received from IR trainers, as well as team leads and segment leads. He said he was provided with a substantial package for his four weeks' of training. At that stage, no one from Madison attended. Part of the training consisted of going into the contact centre and listening to taxpayer calls via headsets. The Code was also the subject of discussion with his IR trainer. He said that coaching sheets and systems were used for IR workers, and those employed through Madison. Then he was trained on a Working for Families module.

5. Mr Head went on to describe his work practices after achieving competency. A particular issue for him was time management, although statistics relating to his work performance were satisfactory. Because he wished to upskill, he asked for, and was allowed, to self-teach for general business work, and prison work.

6. Later, he was able to coach new Madison workers, as a "buddy". He felt he was fully part of the IR team. His initial three-month job was extended twice in the course of his employment. Eventually, he obtained a permanent role with IR. Although he moved to a new building to undertake this work, he felt that nothing really changed.

7. It is apparent from the TRISS records that when Mr Head had concerns regarding his pay rate, he contacted Madison to deal with these.

8. Health, well-being and safety issues were dealt with by Madison; following an earthquake, he was contacted by Madison.

9. Some issues occurred, such as those relating to attendance, timeliness and some inappropriate discussions – these issues were dealt with by Madison, after they had been raised with Madison by IR.

10. Mr Head accepted that issues concerning sick leave and annual leave were also dealt with by Madison.

11. In June 2019, a health and safety issue arose in the Palmerston North building where Mr Head and other Madison employees were engaged. Madison managed the issues arising, including the establishing of a roster which had him and others placed on paid standby.

12. By the time Mr Head gave his evidence, he was an employee of IR; he acknowledged he then performed a broader range of functions than when he was on assignment from Madison. He said there was no business need for him at the time of his employment by Madison to perform broader functions with other tax-types, and this was why IR used contingent labour, involving temporary cover during periods of high demand. Thus, when on assignment from Madison, he was trained in Working for Families and general business; since becoming employed by IR he had then trained in Student Loans, Employers and KiwiSaver.

13. At the time of giving his evidence, he was at the point where he needed only one more skill to have all of those pertaining to a CSO. He also acknowledged that the way he was managed had changed, including the use of the My Plan document for

meetings with his manager, the way he uses MIRI, and other employment-related issues which are dealt with directly by IR.

14. Mr Head said that he always felt part of IR. That said, he acknowledged he had not expressly said to Madison or to IR or to anyone else that he was an employee of IR. He acknowledged that throughout his assignment with IR, he had referred to himself as a "Madisonian" and appreciated the difference between his assignment with IR on behalf of Madison, and employment with IR.

15. Accordingly, we do not accept his evidence that when he became employed by IR, this was exactly the same as the job he had with Madison.

16. We are satisfied that the way in which Mr Head's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Mr James Wright

17. Mr Wright worked at IR for eight months, from 23 January 2019 to 27 September 2019.

18. He said although he was given first-day instructions by Madison, no one from Madison was present when he arrived at IR premises. He met other Madison workers in the foyer, and an IR trainer. He said the trainer stressed that previously Madison staff may have been treated differently than IR staff, but now they should be regarded as employees with IR, because they would have access to all resources of IR. Ethical and security issues, under the Code, were emphasised.

19. Mr Wright described the training phase. Once that ended, he worked in a team where there were three IR employees and three Madison workers, doing the same work, although Madison workers did not have the option of moving into different areas. There were more limited options for further training than IR staff.

20. Performance, however, was monitored under the same system as IR employees. Similarly, daily performance statistics were prepared for all workers, and all had access to them.

21. Mr Wright attended "monthly catchups" with a Madison business manager. Prior to these, the month's statistics were supplied to Madison by IR, although Mr Wright had already seen these, and they had often been discussed in the team. He did not think there was much to talk about with Madison.

22. It is apparent from TRISS records that the topics which were discussed in meetings included the length of after-call time, and whether he was complying with his start and finish times. Illness was discussed with Madison. Leave issues occurred in April 2019, and these were raised by IR with Madison.

23. In the course of his employment relationship, Mr Wright received ongoing instructions from Madison on such topics as leave, sickness, timekeeping, and newsletters covering current events and providing wellness tips and recipes.

24. Punctuality became an issue with Madison writing him a letter setting out its expectations. This included issuing instructions as to how to take time off for appointments.

25. Mr Wright raised questions regarding Union relations with Madison, including whether Madison was still talking to the PSA, in June 2019.

26. Mr Wright accepted that he sought leave from Madison for 14 days sick leave, and that Madison approved these leave requests. It also managed issues relating to his adherence to breaks and start and finish times. A structure was set up where Mr Wright would email Madison at the start and end of his breaks to ensure he was taking these appropriately. Madison continued to monitor this issue by telephone discussion.

27. Performance statistics were provided about call length and call times were prepared, but Mr Wright acknowledged he never had a one-on-one meeting with his IR team leader about these. They were addressed in the meetings he held with a Madison consultant from time to time.

28. Mr Wright accepted that he undertook a small slice of the overall CSO role, compared with permanent IR employees; and that he did not receive the same opportunities for training in such areas as Student Loans and Small Businesses.

29. Mr Wright referred to himself as a "Madisonian", and stated people knew there was a difference between Madison employees and IR employees.

30. We find that in his evidence, Mr Wright downplayed his involvement with Madison.

31. We are satisfied that the way in which Mr Wright's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Mr Samuel Gregory

32. Mr Gregory worked for 15 months at IR, from 2 July 2018 to 29 September 2019. He described the comprehensive training, including on IR's Code. He also learned about tax issues relevant to the tasks he was to undertake, on IR's Learn IR programme. In addition, he was trained on a Working for Families module. When undertaking phone work, more experienced CSOs would act as trainers.

33. After some initial difficulties, Mr Gregory achieved competency. Following this step, he performed his CSO role. In his evidence, he described ongoing interactions with both Madison managers and IR managers.

34. He accepted that Madison staff were the point of contact for employee issues.

35. It is apparent from the TRISS records that Madison maintained regular contact with Mr Gregory whether by email or meetings, at which performance issues (such as logging in and logging out, adherence and other issues) were discussed.

36. When Mr Gregory received a compliment, he sent an email to Madison mentioning the matter, as it might, he said, help his case for Employee of the Month with that entity.

37. Mr Gregory accepted that Madison managed dress issues, sick leave issues, pay rise issues, concerns he had as to the use of Microsoft teams and lateness matters.

38. Madison provided Mr Gregory with paid Union leave to attend training and meetings as a PSA delegate, which was not on-charged to IR.

39. Madison addressed Mr Gregory's work arrangements when he was impacted by Palmerston North building issues. He asked Madison to raise concerns about the building issues with IR.

40. He completed an exit interview with Madison.

41. After working via Madison, Mr Gregory became an IR employee. He accepted that when working for Madison, the work he undertook was Working for Families and Frontline Foundation; and that becoming employed by IR, he received significant additional CSO training, including in Student Loans, Employers and KiwiSaver.

42. This evidence supports the conclusion that the CSO role when he worked for Madison was more confined than the CSO role he undertook subsequently when employed by IR.

43. He confirmed that he did not, at any time prior to the proceedings being filed, claim he was in fact an employee of IR rather than Madison.

44. He acknowledged that during his employment he was reminded that Madison was his employer, not IR.

45. Mr Gregory also accepted that at no stage prior to the proceedings did he claim he was employed by IR.

46. We are satisfied that the way in which Mr Gregory's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Ms Rebecca Langford

47. Ms Langford worked for nine months at IR, from 5 November 2018 to 3 August 2019. She then applied to IR itself for a position.

48. She described her training at IR's Takapuna office. She was trained by IR staff. Madison managers were not present, although a Madison business partner attended morning tea on the first day. Training continued for four weeks.

49. Ms Langford had a concern in regard to her pay rate, which she raised with Madison. This resulted in her being paid a "competency" rate, despite not having been declared competent by IR. Ms Langford turned to Madison for information concerning her employment entitlements including payment during statutory holidays, bereavement leave entitlement, extent of hours of work, and sickness issues.

50. Ms Langford described meetings that occurred one-on-one with IR team leaders weekly, as for other IR employees. However, she also undertook regular meetings with Madison.

51. She felt she was doing the same work as were other IR employees. For instance, her whole team worked on Working for Families issues. Team leaders would manage workflow, and answer any necessary questions during the working day, and at breaks.

52. Time had to be logged into IR's MIRI daily, and to Madison's online portal. She considered this was double handling.

53. She had monthly meetings with a Madison business partner, for 10 or 15 minutes. A roster would be provided in advance in which this time would be scheduled. She felt there was no real in-depth discussion, and that the meeting was a "check-up"; this was because Madison managers did not know much about the work which was being performed.

54. Madison engaged with Ms Langford on multiple occasions during the course of her assignment, whether by meeting, telephone calls, or email.

55. At the conclusion of her fixed-term employment with Madison, Ms Langford then discussed with the organisation roles she might obtain with other Madison clients, indicating she understood the structure of the role in which she had been employed by Madison to that point.

56. Ms Langford accepted she only performed a narrow portion of the overall CSO role, because IR employees received training on topics which she did not, and because they had "higher delegations than we were allowed".

57. Ms Langford accepted that IR team leads provided technical support, whilst IR employees used "a My Plan document for coaching and development"; she did not.

58. She said that she considered herself still employed by Madison under her employment agreement until the end of her assignment.

59. This acknowledgment contrasted with her evidence that she felt Madison had no real understanding of the work she was processing, and that she felt Madison ceased to be her employer.

60. We find she understood Madison was the employer; she acknowledged this in the answers she gave during her exit interview, when she said she had been employed with Madison.

61. We are satisfied that the way in which Ms Langford's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Ms Ashleigh Crichton

62. Ms Crichton worked as a CSO at IR's Palmerston North office for seven months, from 12 November 2018 to 8 May 2019.

63. Ms Crichton described attending an initial meeting at IR, along with a group of 15 people, run by IR staff. No one from Madison attended.

64. Initially, computer learning about income tax and Working for Families was undertaken via particular modules. She felt the training was rushed, as IR needed those who were being trained to commence work.

65. Once the training was concluded, Ms Crichton was allocated a desk in the call centre. Each day when she logged into her computer, she was presented with a timetable which stated start times, and when breaks could be taken. This was a timetable that the IR team leader had set. There were about 60 people in the call centre, from Madison and IR. She did not know who had been introduced by Madison, and who was an IR employee; she was unable to tell the difference.

66. Her team lead would assist her with any questions she had. She was also supported in weekly team meetings.

67. A need to take leave urgently arose, which she found difficult as she had to ask both her team leader and Madison.

68. She met with a Madison business partner approximately once a month. Meetings would take between five and 15 minutes.

69. Madison's records show that some attendance and leave issues were discussed by phone and email as well as in the regular meetings.

70. Attendance issues arose which were initially raised by email and culminated in a meeting with Ms Crichton and her PSA representative. A support plan was developed. In the course of that process, Mrs Mella made observations as to calls Ms Crichton had undertaken a few days earlier. Mrs Mella also engaged with Ms Crichton's PSA representative regarding the call plan. She was then given assistance by Madison at IR's premises to assist her in reaching her expected level of performance.

71. Her team lead, Ms Shaw, explained that the Madison business partner had looked at the validation processes being carried out by Ms Crichton, as an aspect of customer service whilst she herself also checked tax technical issues.

72. It is also evident from the TRISS records that Mrs Mella provided personal support to Ms Crichton on some occasions, so as to avoid issues over absence, and to assist in her leave arrangements. In her evidence, Ms Crichton accepted that members of Madison management were genuinely concerned about her welfare.

73. Ms Crichton also engaged with Madison regarding her pay, including a query as to her entitlement to paid public holidays.

74. She accepted that the features of the role outlined to her in her job brief were consistent with what actually happened during her time at IR.

75. Ms Crichton accepted that she only undertook Frontline Foundation work, and then Working for Families; there was a broader range of product types that IR CSOs would work on.

76. Ms Crichton did not tell Madison at any time she was not its employee, nor assert to IR that she was employed by it.

77. We are satisfied that the way in which Ms Crichton's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Ms Tamara Evans

78. Ms Evans worked as a CSO at IR's office for seven months, from 20 November 2018 to 5 July 2019.

79. On her first day, Ms Evans met about 20 other people at the foyer of Dunedin's IR office. They were met by an IR manager, but nobody from Madison was present.

80. The first few weeks involved training. Four or five IR trainers participated in the first few weeks of instruction; each was specialised in a different area on which trainees would be working. There was a focus on confidentiality.

81. Initially, Ms Evans was trained on administrative tasks such as helping taxpayers to find their IR numbers; once base training was completed, she moved to what she described as "employer's training", which involved assisting employers who wished to resolve PAYE and KiwiSaver issues.

82. Ms Evans said that if she experienced issues that affected the pace of her work, or if she had problems with the system, she would go to her IR team leader. Other issues, such as illness, would be dealt with via Madison, although she would also inform IR of her circumstances.

83. She held monthly meetings with a Madison manager; these were a catchup to see how she was performing.

84. Annual leave was dealt with via an online portal with Madison.

85. Madison's records verify its regular contact with Ms Evans. She accepted that the support given by Madison was genuine, including with regard to her personal health.

86. Madison assisted Ms Evans with regard to correct the quantum of deductions for her Union membership with PSA.

87. A bullying issue arose at work which she discussed with a Madison business partner between three and five occasions. At least two of these were in person, with a business partner travelling to Dunedin to talk to her.

88. Eventually Ms Evans resigned, addressing her notice of resignation to Madison. In her exit interview she acknowledged Madison had been a good employer, but she had decided to move away from phone-based work. She confirmed that all the features outlined in her job brief were in actual fact what happened when she worked at IR. She also acknowledged she had never told anyone, including IR and Madison, she thought IR was her employer prior to the issuing of these proceedings.

89. Ms Evans said that the matters that were set out in her IEA were consistent with what actually happened in reality at IR.

90. We are satisfied that the way in which Ms Evan's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Mr Dylan Crook

91. Mr Crook worked as a CSO IR for seven months, from 26 November 2018 to 19 June 2019.

92. He stated that training occurred at Te Rapa in Hamilton with IR trainers; no one from Madison attended.

93. The training took some six weeks and concerned general income tax. IR trainers explained what was required when dealing with IR customers. He was also trained in Working for Families, initially in a classroom setting, and then on the phones.

94. Weekly meetings were held with an IR team lead, which would include the other Madison person in Mr Crook's team, and IR employees. At these meetings people could raise issues about work, make comments about the system and ask questions as to what might be changing, during the business transformation period. Mr Crook felt he was no different to IR employees.

95. Mr Crook said he believed he became an employee of IR "pretty much from the start", because everything he was doing was the same as IR's CSOs. But he also accepted that the work he was doing was a slice only of the CSO job brief.

96. He said the only real difference was that IR employees went home earlier than Madison employees; and that Madison employees could only claim time for designated hours, even though extra time was often worked. This seemed unfair.

97. He said the only contact he had with Madison was the sending in of timesheets, the receipt of emails, and a monthly meeting with a Madison business partner. He said the meetings were relatively short.

98. Madison's TRISS records confirm email communications on such topics as attendance and absenteeism, concerns about Mr Crook's health and wellbeing which Mr Crook accepted was genuine, and as to requests for leave.

99. Mr Crook confirmed in his evidence that what he signed up to as set out in his job brief was actually what happened in reality at IR. He did not reject his employment with Madison. His team leader received no report of this nature, and Madison has no record of this either – points which were not challenged by Mr Crook.

100. Mr Crook said that he was contacted by the PSA when the Union initially attempted to bargain for a collective agreement with Madison, so that Madison employees would have the same rights as IR employees. He signed up to the Union because he felt this initiative was fair. He agreed the PSA, at the time, viewed Madison as his employer when it initiated bargaining in relation to his terms and conditions.

101. We are satisfied that the way in which Mr Crook's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.

Ms Wendy Kain

102. Ms Kain worked as a CSO at IR's Whangarei office initially via another provider from January 2018, and then via Madison from 20 April 2018 to 30 August 2019, a total of 15 months.

103. Once she became a Madison employee, she said there were meetings with a Madison representative about every four weeks. These were 10-minute meetings, informal in nature when, for example, wellness packs and other Madison merchandise were provided. Most of her catchups, she said, was spent talking about possible contract extensions, and whether she would receive the same overtime rate as her IR colleagues.

104. She was in a transactional team alongside IR employees doing the same work; she would talk to tax agents, deal with deceased accounts, and undertake transactional tasks.

105. Ms Kain accepted that the assistance provided by IR was in the nature of technical support, and that meetings with her team lead were in respect of workflow.

106. She and colleagues met their IR team leader fortnightly as a team, and in one-on-one meetings. Her work was checked by IR, and she received feedback on that from IR.

107. In July 2019, she moved to Working for Families work.

108. Ultimately she obtained a permanent role with IR as a CSO.

109. She acknowledged she participated in social events arranged by Madison for its employees in Whangarei.

110. Madison's TRISS records verify regular engagement with Ms Kain, on a variety of topics, including leave, attendance, start and finish times, and overtime. She felt she had a personal relationship with the Madison business partner with whom she engaged.

111. As already noted, in March 2019, Ms Kain signed a second fixed-term IEA when she had been working in her CSO role for about a year. She again acknowledged Madison as her employer. She accepted this was in fact the case.

112. We are satisfied that the way in which Ms Kain's employment relationship operated in practice was consistent with the overarching documents we have analysed pertaining to that relationship.