Testing the boundaries — Employment Court provides fresh guidance on the employee vs contractor distinction, 25 June 2020

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It is vital for employers to understand the legal distinction between an employee and an independent contractor. The status of employee is a gateway to access minimum employee entitlements, such as KiwiSaver, parental leave, holiday pay and the entitlement to raise a personal grievance under the Employment Relations Act 2000 (ERA).

The contentious issue of whether courier drivers are employees or independent contractors was raised again in a recent Employment Court decision, *Leota* v *Parcel Express Ltd* [2020] NZEmpC 61. Notably, this decision engaged with a longstanding Court of Appeal judgment, *TNT Worldwide Express (New Zealand) Ltd* v *Cunningham* [1993] 3 NZLR 681 (CA), as both cases discuss the legal status of courier-drivers/owner-drivers. However, *Cunningham*, which was released almost 30 years ago, was guided by the provisions of the former Employment Contracts Act 1991, while *Leota* was decided under the provisions of the ERA.

This topic has received a good deal of media attention and publicity recently, which could lead to changes to the way independent contractors and/or employees are classified. There was also public consultation by the Ministry of Business, Innovation and Employment earlier this year on a document called “Better Protections for Contractors” which may encourage reform. But for now, *Leota* is the latest word on this issue.

Background

Mr Leota signed an independent contractor agreement with Parcel Express Ltd (Parcel Express) in 2018 and worked with the company for around one year. His agreement was terminated after he raised concerns about being asked to pick up tyres “as a favour” for a week.

Mr Leota had limited ability to communicate and comprehend English. He was also described by the Court as naïve, and he did not have a real understanding of what his status was when working with Parcel Express nor the details of the business arrangement he had entered into.

The legal test and judgment

The meaning of “employee” is defined in s 6 of the ERA. It provides:

"6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee —

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

…

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority —

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. …"

When conducting a s 6 analysis, the Court must examine the "real nature of the relationship" between the parties. The test requires the Court to consider all relevant matters, which requires looking beyond any statement made by the parties as to the nature of their relationship. This means the contractual provisions expressed by the parties are not determinative of the relationship and are not necessarily reflective of how the relationship operated in practice. It is an intensely factual inquiry. The Court in *Leota* noted that common law factors traditionally used to distinguish an employment relationship from other relationships are "susceptible to manipulation" and that Courts must be "wise to such stratagems".

The issue of whether a person is or is not an independent contractor often arises and there is a significant authority which discusses the issue. The Supreme Court judgment *Bryson* v *Three Foot Six Ltd (No 2)* [2005] NZSC 34 is a benchmark decision and, referring to *Bryson*, the Court in *Leota* said relevant matters included:

> [36] …any divergences from, or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice; (described by the Court as "crucial to a determination of [the relationship's] real nature"); any features of control and integration (described as the control and integration test); and any indications as to whether the contracted person has been effectively working on his/her own account (described as the fundamental (economic reality) test).

The Court then applied this guidance.

Control test

The Court began by citing a passage from *Cunningham*, which succinctly summarises the control test:

> "The greater the degree of control stipulated by the contract, … the greater the risk that it may cross the boundary line and become a contract of employment."

In this case, the Court identified several key indicia of control between Mr Leota and Parcel Express:

- Mr Leota's courier run was predetermined by Parcel Express. He could not change his boundaries and could only pick up and deliver to Parcel Express customers.
- He was required to comply with company procedures and the directions of company officers and attend training hosted by Parcel Express.
- He could not take more than 20 days' holiday a year without approval. For the time he did take off, he was required to give advance notice and find a replacement.
- He wore a Parcel Express-issued uniform and was restricted in the type of vehicle he drove, insurance it had and the Parcel Express signwriting on the van.
- It later also emerged in evidence that Parcel Express had audited Mr Leota's mileage without his knowledge.

The Court acknowledged that a certain degree of control and flexibility can be mutually beneficial for both parties. However, after examining the facts of the case, the Court held that Mr Leota had little to no

autonomy over his work, and although being described as “his own boss”, in reality, the company determined what Mr Leota did during his day, when he did it and how he did it.

Economic reality

The key question that must be considered by the Court in this test is whether the worker runs their own business or works for someone else’s business. The Court answered this question by concluding that “in reality what Parcel Express was asking Mr Leota to do was to assist it to build its own business”.

Parcel Express argued that Mr Leota was free to “spend time on his run cultivating new and existing customers”. The company also suggested that, during the evenings, he was free to increase his earnings by conducting Uber Eats services in his Parcel Express van. The Court rejected this, labelling the opportunities Mr Leota had to grow his business as “virtually non-existent” and noting that operating an Uber Eats side-line was not connected with the parcel delivery service Mr Leota was said to be running.

Industry practice

Mr Leota was required to purchase his own courier van. It is common practice (though not inevitable) within the courier industry for drivers to purchase their own vehicle as a capital investment, a requirement that would be at odds with being an employee. However, the Court cautioned against using industry practice as a determinative factor, as it may “lead to the tail wagging the dog”.

The Court also noted that vulnerable workers such as Mr Leota, who have limited knowledge of the legal framework, who lack any degree of business savvy, or where English is not their first language, cannot be expected to have known what the well-accepted industry standard was.

After examining all the relevant factors, the Court was satisfied that the real nature of the relationship between Mr Leota and Parcel Express was that of an employment relationship.

Key points for employers

This judgment provides fresh guidance on how the courts will determine whether an individual is an employee or independent contractor under s 6 of the ERA. In light of this guidance:

- Employers should take the opportunity to assess whether the way they have labelled their workers is consistent with how the relationship operates in practice. This case is a useful reminder that the provisions of the relevant agreement are just one of many factors that the courts will use when determining whether an individual is an employee or independent contractor, particularly where “vulnerable workers” are engaged. It is the “real nature of the relationship” that matters.
- Miscategorising individuals may expose employers to tax consequences and to other retrospective obligations owing to the employee, such as holiday pay. Whilst it may seem initially attractive to employers to label a worker in a way that shifts some economic burden onto the individual, that will only be safe to do when the relationship can be legitimately categorised as an independent contracting one. That is more likely to be the case where the contractor has some bargaining power in the relationship and may be hard to sustain when the worker is deemed to be vulnerable.
- Finally, whilst the Court makes clear that the decision only affects Mr Leota and each case has to be treated on its own merits, it certainly has the potential for much wider application across the owner/driver industry in New Zealand.