IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 61
EMPC 167/2019

IN THE MATTER OF	application for a declaration under s 6(5) of the Employment Relations Act 2000
BETWEEN	MIKA LEOTA Plaintiff
AND	PARCEL EXPRESS LIMITED Defendant
AND	FREIGHTWAYS LIMITED Intervener

Hearing: 20-22 November 2019, 11-13 February 2020
(Heard at Auckland)

Appearances: G Pollak and M Pollak, counsel for plaintiff
P Robertson and C Child, counsel for defendant
E Butcher and A Evans, counsel for intervener

Judgment: 7 May 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Summary

[1] Mr Leota was a driver for a courier company, Parcel Express Ltd (Parcel Express). He has asked the Court for a declaration that he was an employee of the company. Parcel Express says that Mr Leota was an independent contractor, not an employee.

[2] Employee status is an important issue. It provides gateway access to a range of statutory entitlements, including minimum wages and holiday pay, redundancy,

parental leave, KiwiSaver contributions, and the personal grievance procedures and remedies provided for under the Employment Relations Act 2000 (the Act). It also provides the gateway to accessing other rights, such as the right to collectively bargain.

[3] The Act sets out the approach the Court must take in deciding whether a worker is an employee. The Court is required to determine the real nature of the relationship. Whether a particular worker is an employee is an intensely fact-specific inquiry. There is no presumption that whole categories of workers are independent contractors.

[4] In this case I am satisfied, on the basis of the evidence that was put before the Court, that the real nature of the relationship between Mr Leota and Parcel Express was an employment relationship. This judgment does not find that all courier drivers in New Zealand are employees. It makes a declaration of Mr Leota's status only.

[5] I make one other preliminary observation. Parcel Express made much of the fact that Mr Leota signed an agreement which referred to him as an independent contractor, that he knew that this was so and that he went into the arrangement with his "eyes wide open". Mr Leota speaks English as a second language. He did not have a grasp of the legal requirements relating to status (independent contractor versus employee). Nor did he have a grasp of the agreement that Parcel Express drafted and which he was asked to sign, or the associated documentation he was given.

[6] As the Act makes clear, the fact that a working relationship is described in a particular way is not to be treated as determinative. That largely reflects a Parliamentary acknowledgement of the dynamics inherent in workplace relations, and the vulnerabilities of some workers.[1] A document describing the relationship in a particular way is less likely to carry a status argument across the line where one of the parties is at a disadvantage, has not been given a fair chance to understand what they are being asked to sign, and has no or limited knowledge of the implications of

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[1] Employment Relations Bill 2000 (8-1) (explanatory note) at 3, where it is stated "With regard to dependent contractors, the Bill extends access to the rights, obligations and protections of employment law to *those persons who are routinely classified as "independent contractors", but are in reality working in situations that are identical to an employment relationship.* To this end, the Bill provides clear statutory direction in the application of specific legal tests when deciding whether individuals or groups employed as nominally independent contractors are, in fact, actually employees. The primary consideration is given to the reality of the relationship, rather than the nominal "label" given by the parties to it." (Emphasis added)

agreeing to the use of the label selected by the other contracting party. In circumstances such as these the way in which the relationship operated in practice is likely to be more revealing of its true nature.

[7] There is no doubt that it will sometimes suit a person to work on their own account, unhampered by the strings that attach to being an employee. This is often true of highly skilled, and sought-after, workers. There is no doubt too that it will sometimes suit a company to engage services in this way, avoiding the obligations and legal liabilities that attach to being an employer. Such a model provides a company with a degree of flexibility it would not otherwise have. There is also no doubt that in some cases the perceived benefits of characterising a worker as an independent contractor are decidedly lopsided, and that a degree of cynicism has likely informed the way in which the relationship was described from the outset. I have concluded, based on the totality of the evidence before the Court, that Mr Leota's case is an example of that.

Background and contractual provisions

[8] At this point it is helpful to set out some of the facts and the terms of the agreement which Mr Leota signed. I return to the details of the factual context, and my findings in relation to the way in which the relationship operated on a day-to-day basis, in further detail below.

[9] Mr Leota is a member of the Samoan community in South Auckland. He says that he was approached in his local church by Mr Talalelei, who has worked at Parcel Express for several years. He says that Mr Talalelei encouraged him to consider coming to work for the company. Mr Pollak, counsel for Mr Leota, put it to Mr Talalelei that he actively recruited drivers from the Samoan community on behalf of Parcel Express, including because Samoan men are known to be compliant workers. Mr Talalelei did not accept this, although did accept that he was active in his local Samoan church and that individuals approached him from time to time to discuss work opportunities with the company.

[10] What is clear is that the company was having difficulty retaining drivers. It is also clear that Mr Leota, who was not currently working, understood that there may be an opportunity for him at Parcel Express and a meeting was arranged with the Managing Director, Mr Cole, on 12 February 2018. At the meeting Mr Leota was told that if he came to work for the company he would need to buy his own van; that the van would need to have Parcel Express signwriting; that the signwriting would cost about $2,000 and would be at his expense; that he would be required to pay a $2,000 bond; and that he would need to sign a contract. Mr Leota accepted in cross-examination that Mr Cole told him that he would be his own boss.

[11] Mr Cole says that at the meeting he went through a document entitled "Proposal for Mika Leota Proposal to Become an Owner Contractor Courier" and gave Mr Leota an "OWNER DRIVER INFORMATION SHEET", a pre-placement medical questionnaire and a copy of an agreement. He said his expectation was that Mr Leota would take this documentation away and read it.

[12] Mr Leota accepts that Mr Cole gave him a copy of the proposal. That document referred to a number of financial matters in relation to the required van and the fact that Mr Leota would receive a guaranteed minimum payment for his assigned run of $240 per day plus GST. It appears that Mr Leota partially completed the information sheet and the medical questionnaire on 12 February 2018. The information sheet omitted Inland Revenue Department details and a GST number. As it transpired, Mr Leota did not have a GST number and had no idea what one was.

[13] Mr Leota was adamant that he did not receive a copy of the agreement until 1 March 2018, the date on which it was signed. Mr Cole was adamant that he gave the agreement to Mr Leota on 12 February. The fact that the agreement was later provided to Mr Leota under cover of a letter dated 1 March, which made no mention of the fact that an earlier draft of the agreement had been provided, tends to suggest that it was not given to him at an earlier date. Even assuming that it had been, there is nothing to suggest that Mr Leota was advised to go away and read the agreement, take advice on it and suggest any changes he might wish to make to it. Rather, Mr Cole's evidence was limited to an "expectation" that Mr Leota would read what he had been given.

[14] Around this time the driver on one of the runs returned to India for a short time and difficulties with a relief driver arose. The company asked Mr Leota to do the run, which he did.

[15] Mr Leota was, by this time, taking steps to buy a van. Parcel Express facilitated the purchase. Either Mr Cole or Mr Talalelei arranged for Mr Leota to meet with a person called Mr Sope Sope, who said that he would sell Mr Leota a second-hand courier van in the requisite Parcel Express colour for $17,000. Mr Leota only had $4,100, which was paid to Mr Sope Sope as a deposit. An arrangement for the balance of $12,900 was then put in place which involved Parcel Express, Mr Leota and Mr Sope Sope. Under the arrangement Mr Sope Sope retained ownership of the van and monthly deductions were made by Parcel Express from Mr Leota's pay to cover the purchase price over a 10-month period.

[16] The agreement was signed at the 1 March 2018 meeting. I have concluded that it is more likely than not that Mr Leota did not have a copy of the agreement and was not provided with an opportunity to read and take advice on it, before he was asked to sign it.

[17] I pause to note that each of the witnesses for the company made particular mention of Mr Leota's ability to comprehend and communicate in English. I found this aspect of the company's evidence strained. I preferred the evidence of Mr Leota's son and Mrs Va'a (who was the Sales Manager at Parcel Express and who assisted Mr Leota and other Samoan drivers in the workplace in understanding various issues) as to the difficulties Mr Leota had with English as a second language, and more generally. That was firmly reinforced by my own impression of Mr Leota during the course of the hearing and in responding to various questions during evidence, including by reference to legal documentation prepared by the company. While the company advanced a submission that Mr Leota lacked credibility, that was not the impression I formed having regard to the evidence as a whole. Mr Pollak (counsel for Mr Leota) described his client as "naïve". That is an apt characterisation.

[18] I was left with little doubt that Mr Leota had no real understanding of what his status was when working with Parcel Express. His acceptance in cross-examination

that Mr Cole told him he would be his "own boss", which I have already referred to, must be viewed alongside other aspects of his evidence.

[19] Evidence was given that many of the drivers with Parcel Express were Samoan. A number worked with the company for less than a year; some abandoned their runs. It appears that, other than Mr Talalelei, each driver was required to pay a bond to Parcel Express as a term of their agreement. In this regard, Mr Leota's agreement provided:

> A Bond of $2,000.00 is required upon signing the Agreement however the company will allow that to be paid through a monthly deduction of $200.00 per month from your Contractor pay until paid in full.

[20] Mr Leota's bond was returned to him two months after he left the company. A number of other workers either did not receive any refund or received a partial refund.

[21] The agreement also dealt with a number of other matters, including by imposing restrictions on the colour, size and type of van which Mr Leota could drive (cl 3.1). The company required that the van display its logo at Mr Leota's expense (cl 3.2(d)). The agreement prohibited him from displaying "any other signwriting, colouring, insignia, names, signs, or notices of any kind" unless approved by the company (cl 3.2(e)) and prohibited him from disposing of the van without the company's prior approval (cl 3.2(f)). Mr Leota was obliged to lease a scanner from the company and pay for any operating and repair costs relating to it (cl 3.2(h)). The leasing costs equated to $120 per month plus GST, such sum being deducted from the regular payments the company made to him.

[22] Mr Leota was assigned a run (the Panmure run), the boundaries of which were set by the company and in which he had no say. He was required to work where and when directed by the company (cl 4.1(a)) and to work in the company's best interests at all times. Mr Leota was obliged to wear a uniform specified by the company (cl 4.1(c)) and to observe and comply with the company's Procedures Manual as amended by the company from time to time. He was also required to comply with any "directions or requests of the Chief Executive Officer or any other manager or officer of the company" (cl 4.1(d)). Mr Leota was prohibited from drinking any alcohol during work hours (cl 4.1(e)) and was required, under the agreement, to attend and

participate in any in-house briefings or instructions (cl 4.1(h)). The agreement specified that Mr Leota was to ensure that documentation was filled out "in accordance with Company procedures, policies and specifications." (cl 4.1(i)) Under the agreement Mr Leota was obliged to hold insurance cover with an insurance company approved by Parcel Express. The insurance cover was to be for an amount and for such risks as the company decided (cl 4.1(k)). The agreement required Mr Leota to maintain a telephone communication link at his home (cl 4.1(o)) and provide another vehicle if, in the opinion of the company, his vehicle ceased to be in good order and condition (cl 4.1(p)).

[23] Mr Leota was required to perform his work to the standard specified by the company from "time to time by way of procedures manuals or written or verbal instruction." (cl 4.3) Mr Leota was not at liberty to exercise any control over the times and days on which his work was to be performed. In this regard cl 6.1 provided:

> Subject to the provisions of this clause the Contractor will personally perform his/her services under this Agreement at such times and on such days as the Company may require. …

[24] Mr Leota could not exceed 20 working days' holiday in any 12-month period without the prior approval of the company (cl 6.4) and he was required to organise a relief driver (who had to be approved by the company) during any period of leave (cl 6.2).

[25] The agreement contained a restraint of trade clause, prohibiting Mr Leota from engaging in or holding any interest whatsoever "directly or indirectly, or [having] any involvement in any business activity which competes with or is in competition with" the business of the company. The period of restraint was six months after termination of the contract and within the 100-kilometer radius of the Auckland central business district (cl 10.1). Mr Leota was also required to keep confidential details of all clients, customers or corporations with whom the company had held, or did hold, a relationship (cl 10.2(b)).

[26] The agreement set out a number of financial arrangements. Clause 4.6 provided that Mr Leota was responsible for any taxation which may be payable in respect of his remuneration for work undertaken under the agreement. The agreement

also stated that Mr Leota appointed the company, as his agent, to prepare a tax invoice each month, showing the gross payment due to him and all deductions made by the company in respect of pre-paid tickets purchased by him, overpayments and "any other sums payable to the Company by the Contractor." (cl 5.5)

[27] The agreement contained a clause entitled "Relationship". It provided:

> **13. RELATIONSHIP**
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> 13.1 The parties acknowledge that the relationship of the Contractor with the Company shall be that of an independent contracting party and not as an agent or employee and the relationship shall not be construed as a joint venture, partnership or otherwise.
>
> 13.2 The Contractor shall not represent directly or by implication or otherwise that the Contractor holds any relationship with the Company or any authority or delegated power of the Company other than strictly as an independent contractor upon the terms and conditions of this Agreement and the Contractor shall not bind or otherwise commit the Company to any arrangement, debt or other liability to make any statement that may bind the Company without the consent of the Company first being obtained.
>
> 13.3 The Contractor shall not be entitled to assign or sub-contract any rights or benefit of the Contractor under this Agreement but acknowledges that the Company may at its option assign the whole or any part of its rights or benefit under this Agreement.
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> 13.4 The Contractor acknowledges that the Company is the owner of the services managed by it and the goodwill of the services is and remains the sole property of the Company and the Company retains the right to allocate and reallocate such services as may be reasonably required from time to time without compensation to the Contractor.

[28] Mr Leota worked for Parcel Express for about a year. His time with the company came to an unhappy end. He had been asked by Mr Cole to pick up tyres from a company called Value Tyres as "a favour" for a week. Mr Leota says that pickup effectively cost him money. The request continued to be repeated until Mr Leota raised a concern about payment on 19 February 2019. His contract was ended the following day.

[29] The company then started raising a number of issues with Mr Leota's performance, including customer complaints which were said to have been received by it. The company gave evidence that all of this was coincidental in terms of timing. The complaints gave rise to deductions from Mr Leota's final payment.

Framework for analysis

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

[31] It is now well established that employment relationships should not be viewed through a conventional contractual lens. As the full Court observed in *Prasad v LSG Sky Chefs New Zealand Ltd*:[2]

> [18] We are not drawn to this [strict contractual offer, acceptance, consideration analysis] aspect of the defendant's argument. It seems to us that it has been overtaken by developments in the law, specifically in the employment sphere in New Zealand and in contract law more generally. In this regard the strict contractual approach favoured under the previous Employment Contracts Act 1991 was displaced 17 years ago by the enactment of the [Employment Relations] Act. That Act, as the name suggests, heralded in a new way of looking at contractual relationships in the workplace. It has more generally been acknowledged that a rigid offer/acceptance/consideration approach in contract law can give rise to difficulties.
>
> [19] The reality is that it is not uncommon for workplace relationships (to use a neutral term) to morph over time and to change their nature incrementally, or for their true nature to emerge once the particular factual context is considered. It is certainly not unusual for there to be no contractual documentation, or documentation of any sort, evidencing a relationship. Nor is it unusual for documentation, when it does exist, to mask the true nature of the parties' relationship, either deliberately or inadvertently. And it is not uncommon for one party to have no idea about what the legal framework for the relationship is. This is particularly so in cases involving vulnerable workers.
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> [20] The sort of bright-line test advanced on behalf of the defendant runs the risk of obscuring the practical realities of working relationships, and focusing on form over substance. That is not an approach mandated by the Employment Relations Act, and is at odds with the underlying objectives of the legislation (including addressing inherent imbalances in bargaining power).
> …
> [23] It is well accepted that the nature of work and the way in which it is being undertaken is rapidly evolving, both within New Zealand and overseas.

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[2] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 (footnotes omitted). Not disturbed on appeal by the Court of Appeal: *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256.

[32] The Court observed that labour-hire arrangements (which it was concerned with) were part of the evolution of work in New Zealand and the way it was structured.[3] Contractor arrangements are also part of the evolution.

[33] Section 6 provides:

> **6 Meaning of employee**
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> (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.
>
> …

[34] As is evident from the way in which s 6 is drafted, the Court's ultimate inquiry is directed at determining the real nature of the relationship. And as s 6(3)(b) makes plain, a statement describing the nature of the relationship is not to be regarded as determinative. All of this is informed by the legislative history to the provision and the underlying statutory objectives.

[35] In this regard, the way in which s 6 is formulated reflects Parliament's purpose when enacting this provision. As the explanatory note to the Employment Relations Bill 2000 made clear, the new Bill was designed to provide a better framework for employment relations, and to recognise that the relationship was not simply a contractual, economic exchange.[4] The underlying policy intent of what was to become s 6 was to "stop some employers labelling individuals as "contractors" to avoid responsibility for employee rights such as holiday pay and minimum wages," in other words to prevent form trumping substance.[5] In 2004 the Court of Appeal, which had

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3 At [23].
4 Employment Relations Bill 2000 (8-1) (explanatory note) at 1.
5 Employment Relations Bill 2000 (8-2) at 5–6.

10 years earlier decided *TNT Worldwide Express (New Zealand) Ltd v Cunningham*,[6] described the enactment of s 6(3)(b) as having been intended to "nudge the law away from the position of almost absolute deference to party autonomy adopted in at least some of the judgments in the *TNT* case."[7]

[36] The Supreme Court had the opportunity to consider s 6 in *Bryson v Three Foot Six Ltd (No 2)*. It explained that "all relevant matters" include the written and oral terms of the agreement between the parties (which will usually contain indications of their common intention concerning the status of their relationship); any divergences from, or supplementation of, those terms and conditions which are apparent in the way in which the relationship has operated in practice (described by the Court as "*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). [8]

[37] As one leading author has observed, all the common law tests and factors for distinguishing employment from other work arrangements are susceptible to manipulation. The Court, he suggests, must be wise to such stratagems.[9]

[38] Stripped back to its fundamentals, the essential issue in a case such as this is whether the worker serves their own business or someone else's business. While the factors relevant to an assessment may vary from case to case, including in terms of weight, the most common questions can usefully be summarised, along with the direction in which an affirmative answer tends to point, as follows:[10]

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6 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, [1993] 1 ERNZ 695 (CA).
7 See *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) at [113].
8 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32].
9 Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, Oxford, 2016) at 331.
10 The table is based on one which appears in Andrew Stewart *Stewart's Guide to Employment Law* (6th ed, The Federation Press, Sydney, 2018) at 56.

Indicia	*Employee*	*Independent Contractor*
Does the hirer have the right to exercise detailed control over the way work is performed, so far as there is scope for such control?	✓	
Is the worker integrated into the hirer's organisation?	✓	
Is the worker required to wear a uniform and/or display material that associates them with the hirer's business?	✓	
Must the worker supply and maintain any tools or equipment?		✓
Is the worker paid according to task completion, rather than receiving wages based on time worked?		✓
Does the worker bear any risk of loss, or conversely have any chance of making a profit from the job?		✓
Is the worker free to work for others at the same time?		✓
Can the worker subcontract the work or delegate performance to others?		✓
Is taxation deducted by the hirer from the worker's pay?	✓	
Does any business goodwill accrue to the hirer?	✓	
Does the worker receive paid holidays or sick leave?	✓	
Does the agreement describe the worker as an independent contractor?		✓

Analysis

[39] The agreement, which Mr Leota accepts he signed, described him as an independent contractor. Clause 13 set out an express acknowledgement that the relationship was one of an independent contractor and "not as an agent or employee." Other terms of the agreement, in relation to financial matters, reinforce the independent contractor point. The way in which the relationship is described in the agreement, and the associated documentation which was given to Mr Leota, points away from an employment relationship and suggests an objective intention by the parties to structure their relationship as one of independent contractor.

[40] There are, however, a number of terms within the agreement which are relevant to issues of control and integration. Suffice to say at this point that, while the parties have described themselves as being in an independent contractor relationship in their

written agreement, there are indicators in the same agreement which tend to undermine that characterisation. As McKay J observed in *Cunningham*:[11]

> 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.

[41] When Mr Leota agreed to work with Parcel Express he was given a run. The run was predetermined by Parcel Express and Mr Leota had no say in it. Parcel Express retained the ability to change the run whenever it wished and did not need to consult with Mr Leota before doing so. Mr Leota was responsible for doing the run full time, from Monday to Friday. He could not work outside the run boundaries and could only pick up from, and deliver to, the customers identified by Parcel Express. He could decide the order in which he did his pickups and deliveries. He could not change his days of work and he was required to be back at the depot at three specified times during the day. Those times were scheduled by the company for operational reasons relating to its business needs.

[42] Mr Leota could not take more than 20 days' holiday a year without the approval of the company and, in relation to any time he did want to take off, he had to give advance notice. He was also required to make arrangements for a replacement driver during any time he took off. Any such driver needed the prior approval of Parcel Express. In the event, Mr Leota never took time off.

[43] A typical day for Mr Leota started at the depot before his first run (which was at around 7.30 am) and finished after his last run (at around 3.30 pm). The start and finish of each day involved tasks relating to loading and unloading the van. While at the depot Mr Leota was free to use the facilities, including a kitchen and bathroom. I accept Mr Leota's evidence that he was kept very busy during drive time and had little spare time to attend to anything else, including rest and meal breaks. His evidence in this regard was supported by his son, who accompanied him on numerous occasions. Mr Talalelei gave evidence for the company that he had plenty of time to complete runs but he was a highly experienced driver who had been with the company for some time. I did not find his evidence helpful in assessing the realities of Mr Leota's situation.

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11 *TNT Worldwide Express (NZ) Ltd v Cunningham*, above n 6, at 716.

[44] A high level of control was exerted by Parcel Express over Mr Leota's work, reflected in the requirement to comply with company procedures, any directions and requests of any officer of the company, attend training, the parameters of the run, who the customers were and how they were to be serviced, the clothes Mr Leota was to wear, the sort of vehicle he was to drive and restrictions on its signage, the extent to which he was to be contactable by the company, the type of insurance cover he was to have and with whom and for how much, the amount of time off he was permitted to have and when, and the extent of the company's involvement in any leave arrangements. It also emerged in evidence that Parcel Express audited Mr Leota's mileage, although Mr Leota was unaware that it was doing so. It remained unclear why the company considered it necessary to do so if, as it says, Mr Leota was an independent contractor.

[45] I do not doubt that the company wished to exert a high degree of control in relation to Mr Leota's work for operational purposes and to meet its customers' demands. Mr Robertson (counsel for the defendant company) submitted that in these circumstances the features of control did not point to an employment relationship; rather, they were neutral. I understood him to suggest that *Cunningham* supported such an analysis. I do not agree. The fact that a putative employer wishes to exert control over a worker in order to meet its own business needs cannot of itself neutralise the impact of control in the assessment process. If it did, features of control would only be relevant in very limited circumstances, for example where control was exercised for extraneous purposes, or for no apparent purpose at all. And, as was observed in *Prasad*,[12] there are difficulties with an argument that it is only factors within the putative employer's control which should be taken into account, or at least given much weight, in considering the real nature of the relationship.

[46] Nor do I read the judgments in *Cunningham* as supporting the sort of neutralisation approach which Parcel Express appeared to be advocating for. Rather, each of the Judges reinforced the point that an overall weighting exercise is required, including having regard to the nature and extent of any elements of control in the relationship. The position was summarised by Casey J:[13]

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12 *Prasad*, above n 2, at [82].

13 *TNT Worldwide Express (NZ) Ltd v Cunningham*, above n 6, at 714. (Emphasis added)

> I am satisfied that both the Tribunal and the Employment Court placed too much emphasis on the ability TNT reserved to itself to control the presentation of its image to the public by the drivers and their vehicles, and the organisation of the arrangements for collection, sorting, and the delivery of the parcels and payments by customers. *That degree of control was inevitable for the efficient running of such a business, whether the couriers were engaged as employees or independent contractors, and to regard it as the decisive feature means that in virtually no circumstances could couriers in this class of business be employed as independent contractors*. As MacKenna J put it in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 1 All ER 433:
>
> "A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence."
>
> … Looking at the present contract as a whole, and having regard to the way it was performed, *I am satisfied that Mr Cunningham accepted only that degree of control and supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor.*

[47] In short, a hirer and a worker may accept a degree of control as necessary and/or beneficial to both of their business interests. In such circumstances control is not indicative of an employment relationship; it is a neutral factor.

[48] There are some similarities, but also some differences, in the circumstances of Mr Leota's case and Mr Cunningham's case. For example, while scheduled meet-up times throughout the day may have been mutually beneficial, it remained unexplained why it would enhance Mr Leota's business opportunities to be required, "without limitation", to observe and comply with the directions and requests of Mr Cole, or any other manager or officer of the company; to refrain from displaying any signwriting (other than Parcel Express's logo) on the van or even display his own name; to have his mileage audited by the company (without his knowledge); and to be restricted in terms of the amount of leave he could take and which required prior approval by Parcel Express, despite Mr Leota having to arrange a substitute driver.

[49] It is notable that in *Bryson*, while Judge Shaw found that it was "absolutely essential" that the directors of Lord of the Rings exercise a very high level of control over Mr Bryson, she nevertheless concluded that the features of control were strongly indicative of an employment relationship.[14] The subsequent judgments of the Court of

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[14] *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [48]–[49].

Appeal and Supreme Court did not disturb this aspect of the Employment Court's analysis.[15]

[50] Despite being described as "his own boss", Mr Leota did not exercise any real degree of autonomy over his work with Parcel Express. Rather, Parcel Express exercised a significant degree of direction and control over Mr Leota's day-to-day work – what, when, where, how and by whom. Parcel Express plainly considered it had the right to exercise control over what Mr Leota did, and expected him to turn up to work each day on an ongoing basis to complete tasks it had set for him. The expectations around the pickup of tyres, and the company's reaction when Mr Leota raised concerns about undertaking this task, are one example of the way in which the company viewed its relationship with him, and the command and control framework that it brought to bear.

[51] I asked Mr Chadwick, the company's Operations Manager, to explain what autonomy Mr Leota exercised on a daily basis. The response speaks for itself:

> Q. You've said, if I understand your evidence correctly, that you appreciated the flexibility and freedom that came with being a contractor, a courier contractor, am I right?
>
> A. Yes.
>
> Q. And I take it that you're suggesting that Mr Leota also enjoyed a degree of freedom and flexibility as a contractor?
>
> A. Yes.
>
> Q. So can you just expand on that for me and explain to me precisely what you see the freedom and flexibility that he enjoyed being?
>
> A. Owning your own business would – for me, as well, a bit of self-pride.
>
> Q. So self-pride?
>
> A. You could – flexibility, obviously, you're out of the office, so you're out meeting people, it gives you – you're not stuck in one office, one place, meeting new people, and you don't –
>
> Q. So, meeting new people, yes?
>
> A. And you don't need to give a reason to – or request time off, or leave, should I say, you've just got to find a relief driver and you can just –

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15 *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA); *Bryson v Three Foot Six Ltd (No 2)*, above n 8.

> Q. But you need to, am I right, you do need to give the company advance notice?
>
> A. … you do need to tell – or let the company know that a relief driver will be operating the run, just so we can obviously make sure the relief driver can legally drive.
>
> Q. Right, and anything else?
>
> A. And it does let you I suppose look after your own finances and look at it as a business side of it, because you're GST registered so you've got to put your GST, you learn the taxes and things like that. So if you did want to go into bigger and better things, it does give you that stepping stone.
>
> Q. Is there anything else from your perspective?
>
> A. Not that I can think of.

[52] I note that two things described by Mr Chadwick as autonomous factors which Mr Leota enjoyed, were not supported by the evidence. The company's payment structure limited Mr Leota's opportunities to "learn the taxes", and it is very clear that he did not develop an understanding of them. Mr Leota could not take time off whenever he wished - he was restricted to 20 days of leave a year and before taking it he had to obtain the company's prior approval.

The relevance of industry practice to the assessment?

[53] I have not overlooked industry practice, and its relevance to the assessment process. The Supreme Court in *Bryson* made it clear that industry practice may be relevant to a consideration of the real nature of the relationship in the context of a s 6 inquiry, although the Court was not required to expand on the extent to which such evidence might assist or how. Reference has been made to the relevance of industry practice in subsequent cases, although there does not appear to be any case in which the point has been substantively explored or has had a material impact on the analysis.

[54] While I accept that industry practice may be relevant to assessing whether a worker is an employee in some cases, I consider that it is a factor best approached with caution. That is because it may lead to the tail wagging the dog. The mere fact that an industry considers that its workers are engaged as independent contractors cannot, of itself, be enough. It may simply reflect a mistaken understanding as to the actual legal status of some or all of its workers. The point is that if Parliament had intended

those working within a whole industry to be categorised as independent contractors, it is likely it would have said so rather than imposing a fact-specific, case-by-case test which the Court must work through, applying s 6. In this regard it is notable that Parliament has not chosen to make special provision for courier drivers, unlike sharemilkers and real estate agents (s 6(4)), volunteers (s 6(1)(c)), and certain persons engaged in film production (s 6(1)(d)).

[55] Two witnesses gave evidence which touched on industry practice – one on behalf of the plaintiff, and one on behalf of the defendant. Neither was an expert on the topic and both had an interest in the outcome of the hearing. It appeared to be common ground that over the years there has been a developing preference for what is referred to as the owner-driver operating model, although that is not the invariable practice across the courier industry. Mr Cole gave evidence-in-chief that he was aware, having worked for Freightways Ltd (a major player in the industry), that Parcel Express's systems and practices were ("in most instances") consistent with that company's practices. Standard practices included, he said, working a 9-to-12-hour day; the imposition of delivery service standards; structured pick-up times; buyer-created invoices; 60-day termination clauses; charging for services when the driver was absent; and payment of a daily minimum rate.

[56] However, it became clear in cross-examination that while Mr Cole had worked for Freightways Ltd, that had been a number of years previously, that different contracts apply across the industry and may apply inconsistently in any event. While I accept that a number of companies operate what is known as an owner-driver model, the evidence before the Court fell short of providing any material assistance in determining the real nature of the relationship in this case.

[57] The intervener (Freightways Ltd) filed written submissions in advance of the hearing but did not otherwise seek leave to be heard.[16] Counsel for the intervener cited *Ike v New Zealand Couriers Ltd* in support of a proposition that it was well established that courier drivers were independent contractors not employees.[17] There was, however, no live issue between the parties on the point in that case. As the judgment

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16 *Leota v Parcel Express Ltd* [2019] NZEmpC 152 at [21].
17 *Ike v New Zealand Couriers Ltd* [2012] NZHC 558, (2012) 9 NZELR 348.

records: "It is common ground that Mr Ike was engaged as a contractor and not as an employee…"[18] It is true that the Judge referred to it being "well settled that courier drivers engaged on the basis set out in Mr Ike's contract with NZ Couriers are not to be treated as if they are employees", citing *Cunningham* in support. *Cunningham* was decided under the Employment Contracts Act 1991. The present case must be assessed applying the statutory test set out in s 6, as explained more recently by the Supreme Court in *Bryson*.

[58] I understood the point being made by the intervener to be that a person in Mr Leota's position could be taken to have known that he was being engaged as an independent contractor because it was well accepted that the courier industry operates under this model. However, the analysis makes assumptions about the level and depth of knowledge that someone like Mr Leota would have. Such assumptions are liable to be misplaced in circumstances involving a cohort of vulnerable workers, with limited or no knowledge of the legal framework under which they are asked to operate, where English is a second language and where they lack any degree of business savvy.

[59] I have no difficulty concluding that it is improbable that a person such as Mr Leota would have known about an industry model and I have already found as a matter of fact that Mr Leota did not know that he was being engaged as an independent contractor. Indeed, he had no real appreciation of the basis of the legal relationship at all. And even if Mr Leota had believed that he had been engaged on an independent contractor basis that would not have been the end of the inquiry, for obvious reasons.

Economic reality

[60] Parcel Express contended that Mr Leota was free to "grow" his business. I infer that Mr Leota's business, from the company's perspective, was courier driving.

[61] I was not drawn to evidence from witnesses for the company as to Mr Leota's capacity to build his own business. It appeared to boil down to an assertion that Mr Leota could spend time on his run cultivating new and existing customers. There are a number of difficulties with that proposition. The first is my factual finding that Mr

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[18] At [2].

Leota did not have spare time to materially engage in client building exercises. The second is that in reality what Parcel Express was asking Mr Leota to do was assist it to build *its own* business – the customers were Parcel Express customers, and the more customers it had, the bigger *its* business was. As the agreement made clear, it was not a business Mr Leota could take with him when he left as the company retained control of the customer lists and owned any goodwill Mr Leota had managed to generate. The third point is that the company employed its own sales manager to develop new business opportunities. Mr Leota was expected to refer any new leads to her to follow up on behalf of the company.

[62] Further, the payment mechanism that the company put in place meant that there was no guarantee that additional customers in a particular run area would result in increased business (in terms of financial reward) for an individual driver such as Mr Leota. And while the witnesses for the company said it was possible for courier drivers to bring additional customers on board, there were no concrete examples before the Court of any occasion on which this had actually occurred and what additional income it had produced for a driver.

[63] It appears that Mr Leota never achieved more than his guaranteed daily rate. Rather, the figures before the Court reflect the fact that Mr Leota's ticket redemption rates consistently sat around roughly 50 per cent of his monthly pay, with the company subsidy (the guaranteed daily rate) making up the remainder. In these circumstances it is very difficult to see how Mr Leota could realistically have increased his earnings by growing the number of customers on his run, assuming he had the time to do so. Indeed, the likely impact of any growth in customer numbers on Mr Leota's run would have been a reduction in the amount of money Parcel Express had to pay to Mr Leota each month by way of subsidy. It goes without saying, that would have benefitted Parcel Express not Mr Leota.

[64] Mr Leota's van was emblazoned with the words "Parcel Express" and was fully occupied five days a week with work for the company. I have already referred to the (virtually non-existent) opportunities for Mr Leota to grow the run which he was assigned by the company and in which he had no say.

[65] Parcel Express's argument that Mr Leota could grow his business by doing Uber Eats deliveries in his Parcel Express logo'ed van in the evenings was described by Mr Pollak as "unreasonable". I agree. Such activities may not only have required Parcel Express's prior approval, they may well have pushed Mr Leota over the maximum allowable driving hours limitations. When this was put to Mr Cole, his response was that Mr Leota could arrange for a member of his family to drive the van. It was not explained how this could have resulted in business growth for Mr Leota. More fundamentally, the delivery of Uber Eats would have had nothing more than a tenuous link with the business which Mr Leota was said to be running on his own account and free to grow.

[66] The reality is that Mr Leota had very limited opportunities to increase his remuneration, given the way in which the relationship operated, the continuous nature of the work, and hours, he undertook for Parcel Express and the regulatory restrictions he was subject to in terms of driving hour limitations.

[67] Mr Leota did not advertise on his own behalf and had no time during the day to do any work for anyone other than Parcel Express. He worked exclusively for Parcel Express to enable it to meet its business needs and was guaranteed a minimum sum for doing so. The facts reveal that he never rose over that minimum sum despite the hours he worked, the effort he put in, and the expense to which he went to meet Parcel Express's business requirements.

[68] Mr Leota did not have a GST number. Indeed, it became clear during the hearing that he did not know what a GST number was or why it might be required. Mr Leota was not registered for GST, no GST was claimed by him and no expenses deducted for tax purposes.[19] Parcel Express generated buyer-created invoices which it provided to Mr Leota under an agreement with the Inland Revenue Department. In the circumstances the factor is neutral.

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[19] Note *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 at [17], where it was held that: "Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor." See also *Bryson v Three Foot Six Ltd*, above n 14, at [56]. In that case invoices were generated by the company, rather than by Mr Bryson.

[69] Mr Leota had a van. There are cases, including *Cunningham*, where the fact that the worker has provided expensive equipment such as a van has been held to be a significant indicator that the worker was in business on their own account.[20] Each case must, however, been seen in its own factual context. The factual context in this case is that Mr Leota did not own a courier van before being told by Mr Cole that if he wanted to work with Parcel Express he would need to buy one; that it would need to meet the company's specifications as to colour, size and type; that it would need to have signwriting in the company's name; and that he would need to pay for its running costs and insurance. As I have said, the purchase of the van was facilitated via the company, through a person called Mr Sope Sope who retained ownership of the van while Mr Leota paid it off through regular deductions from the pay he received from Parcel Express. The signwriting was arranged by Parcel Express and it was Parcel Express that invoiced Mr Leota for the costs associated with it. The factual context in *Cunningham* markedly differs. At best, Mr Leota's interest in the van is neutral.

[70] Under the agreement Mr Leota was obliged to provide personal service. If he took leave, as he was permitted to do for a period of four weeks per annum under the written agreement, he was obliged to find a substitute driver for that period. Parcel Express had the ultimate right of say-so over whether they approved of the proposed substitute or not. That is because it wished to be satisfied that any substitute driver would not imperil *its* business. While the ability to substitute labour will generally point away from an employment relationship, a constrained ability to do so, framed as a prohibition without consent, may point the other way.[21] The present case falls within the latter category.

[71] The totality of the evidence strongly suggests that Mr Leota had no business of his own; he was solely in the business of Parcel Express. While there are some factors which are neutral, and others which point towards an independent contractor relationship, the combined weight of all relevant factors tilts the scales firmly in favour of a finding of employment status.

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20 See too the discussion in *Australian Air Express Pty Ltd v Langford* [2005] NSWCA 96 at [18]-[47], distinguishing on its facts the High Court of Australia's judgment in *Hollis v Vabu Pty Ltd* [2001] HCA 44, 207 CLR 21. The judgment in *Vabu* in turn distinguished on its facts the Court of Appeal's judgment in *Cunningham.*

21 Stewart, above n 10, at 57.

Conclusion

[72] Every worker in New Zealand has the statutory right to seek a declaration as to whether they are an employee. If they are found to be an employee they are entitled to the protections and benefits that go with that status. The inquiry is intensely factual and much will depend on the individual facts of each individual case. In assessing where on the spectrum a case sits, the Court will closely scrutinise a range of factors, weighing them in the analytical mix, with the ultimate purpose of determining the real nature of the relationship. The label that the parties have applied to their relationship is but one part of the mix.[22] In assessing the real nature of the relationship in this case, I have found the documentation much less revealing than the way in which the relationship operated in practice.

[73] I do not have any difficulty concluding that Mr Leota was not in business on his own account. Mr Leota was an employee of Parcel Express throughout his time with the company and I make a declaration accordingly.

[74] Mr Leota is legally aided. If any issue of costs arises I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 11.30 am on 7 May 2020

[22] *Prasad*, above n 2, at [93].