Employee or Independent Contractor? Comments on: Three Foot Six Limited v Bryson (CA 246/03, 12 November 2004)

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Abstract

The recent Court of Appeal decision in *Three Foot Six Limited v Bryson* provides the first interpretation at appellate level of section 6 of the Employments Relations Act 2000. Although the majority judgment acknowledged that the definition of employee was different under the new legislation, it viewed this alteration as a "nudge" rather than a radical change in the law. The outcome of the case reflected this view. Industry practice and the intention of the parties carried significant weight in establishing that Mr Bryson was a contractor rather than an employee. While the Court endorsed the use of the "fundamental" test in determining the real nature of the employment relationship, it preferred a more "open-textured" enquiry to establish Mr Bryson's employment status. This approach casts doubt on the relevance of the traditional "tests" in defining who is an "employee".

Introduction

While the "Lord of the Rings" has been enjoying worldwide acclaim, the case of Mr Bryson, an on-set model technician, has been working its way through the Employment Institutions and Employment Courts. The issue in Mr Bryson's case is whether he was an employee or an independent contractor. In November 2004, the Court of Appeal gave a judgment in which the majority held that Mr Bryson was an independent contractor (CA 246/03, 12 November 2004). The case is significant because it is the first time the Court of Appeal has considered the definition of section 6 of the Employment Relations Act. It is also significant because of the treatment by the Court of the traditional tests used to determine the status of a worker and because of the weight they gave to the role of industry practice.

The Employment Relations Act, section 6 stipulates:

> "**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

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(b) includes –
  (i) a homeworker; or
  (ii) a person intending to work; but
(c) excludes a volunteer who –
  (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.

(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."

Both dissenting and majority judgments in the Court of Appeal reviewed the policy intent behind section 6 and modifications to the wording of the section during the Select Committee process. The majority cited a submission by Department of Labour officials that the "policy intent by clause 6 is to stop some employers labelling individuals as 'contractors' so as to avoid the responsibilities that would arise if they were employees" (*Three Foot Six Limited v Bryson*, para 75). However, in his dissenting judgment McGrath J. suggested that the importance the majority placed on industry practice *could* amount to "a label argument" (ibid, para 33) and that "….there is a risk in applying such an argument that a whole industry will be treated as excluded from the provisions of the Act…" (ibid, para 33).

The predecessor to section 6 was section 2 of the Employment Contracts Act 1991 which was briefer and less specific. In the *Bryson* case, the Employment Court clearly viewed the new section as moving away from the previous emphasis on statements of parties' intentions to a more objective analysis of the actual structure of the relationship. However, the majority of the Court of Appeal viewed the change in legislation as a "nudge" rather than a radical change in this area of law. In the end, the parties' intention, in the light of particular industry practices (see de Bruin and Depuis 2004), carried the most weight. The majority specifically rejected (*Three Foot Six Limited v Bryson*, para 105) the appellant's contention that section 6 of the Employment Relations Act did not change the law as stated in *TNT Worldwide Express (NZ) Ltd v Cunningham*. The judgment acknowledged that this interpretation was not "tenable in light of the policy underpinning s 6"(ibid). However, the outcome does appear to resemble a decision that could have been reached under the approach taken in *Cunningham*.

The Appeal Court case: background and key issues

Mr Bryson initially worked for Weta Workshop as an independent contractor. He was then seconded to Three Foot Six Limited for two weeks at the end of which he was invited to continue working. He accepted, although no formal contract was entered into for six months. The contract Mr Bryson eventually signed was called a 'crew deal memo' and was fairly standard in the film industry.

The crew deal memo referred to Mr Bryson as being a 'contractor' and specified that he was not an employee of the company. On the other hand, there were a number of features of the crew deal memo which were more consistent with an employment relationship. These features included sick leave at the discretion of the producer; payment for statutory holidays; the contractor had to work exclusively for *Three Foot Six Ltd* unless approval was given not to; hours of work were stipulated and overtime was paid if they were exceeded; and the company provided all tools except for a few basic tools. In addition, Mr Bryson was trained for six weeks by the company. He was allocated work each day and if he finished that work he would be allocated tasks elsewhere.

Shaw J. held in the Employment Court that Mr Bryson was an employee. This was based on the application of principles that had been developed in two earlier Employment Court decisions that considered section 6 of the Employment Relations Act 2000 (*Koia v Carlyon Holdings*, *Curlew v Harvey Norman Stores*). The principles were:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the 'fundamental' test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

Applying those principles, Shaw J. held that Mr Bryson was an employee, citing the lack of evidence that Mr Bryson was acting as a separate business; his lack of other employment; the requirement for six weeks training; and the content of the crew memo which although referring to independent contractors, read much like a contract *of* service (as opposed to a contract *for* services).

The majority of the Court of Appeal, William Young and O'Regan JJ., acknowledged that the way Mr Bryson's engagement worked out in practice "smacks very much of

employment" (Three Foot Six Limited v Bryson, para 97), but concluded that he was an independent contractor. They held that the almost invariable practice in the film industry for workers to be engaged as independent contractors was a significant factor in them deciding that the "real nature of the relationship" was that of independent contractor.

In his dissenting judgment, McGrath J. cautioned against saying that all film workers are independent contractors because such an approach is a label argument. He viewed the legislation as requiring a determination of the real nature of the relationship on an individual basis and said that it is "not open…to the Court under the definition of "employee" in the 2000 Act to reach a decision that has general application to the film industry." (ibid, para 35). The conclusion reached by McGrath J. was that there were a number of features of the arrangement which "strongly suggest that the underlying nature of the parties' relationship is one of employment under a contract of service." (ibid, para 31). These features included the high degree of control; the level of integration into the business; the set hours and allocation of further work if he finished his tasks early; the inability to work elsewhere; the lack of ability to profit from the job; the provision of tools; the lack of personal investment and the inability to delegate (ibid, paras 28-31).

Comments

Industry Practice

The decision raises a number of issues. The first and most obvious is the role industry practice should play in determining whether a person is an employee. McGrath J. cautioned against 'labelling' all the workers in an industry, whereas the majority saw it as determinative. In the course of the judgment, the majority 'reconstructed' the parties' arguments in terms of whether "services of the sort which Mr Bryson provided (ie. as a member of a film crew)" are properly the subject of contracts of service or for services (ibid, para 80). This reconstruction moved the focus to the *type* of work performed in the industry as being determinative of the status of the worker rather than on the *structure* of the arrangements by which the work is carried out.

The majority recognised that in practice, Mr Bryson's engagement "smacks very much of employment" (ibid, para 97), and that although the significance of contractual terms has been downplayed, "standing alone" the contractual terms are not determinative (ibid, para 109). But then they held that a properly conducted "open textured inquiry" into the real nature of the relationship would consider the "external reality…most obviously relevant to the situation of the parties", that is, the fact that there are hundreds and perhaps thousands of people who work in the film industry in very much the same way as Mr Bryson did, and do so as contractors (ibid, para 111). And so they held that "[i]n the light of industry practice there is no basis for holding Mr Bryson's relationship with the appellant was other than what was provided for in the contract he signed." (ibid).

On this analysis, industry practice appears to trump all other 'relevant matters'.

Interpreting Section 6 in the Light of the TNT Decision

The leading decision under the previous Employment Contracts Act, *TNT Worldwide Express (NZ) Ltd v Cunningham*, was used by all Court members as the basis for measuring the changes that the new section 6 of the Employment Relations Act has brought to the meaning of 'employee'. Initially, in a decision in 2001, the Employment Court had viewed the TNT decision as meaning that the expressed contractual intentions of the parties prevailed over everything else (*Koia v Carlyon Holdings Ltd*). Subsequently, however, that was considered to be "too simplistic an analysis" and instead the TNT decision was held to require that all relevant factors evidencing the intention of the parties at the time the contract was entered into were to be considered (*Curlew v Harvey Norman Stores*).

Both the majority judgement and the dissenting judgement in *Bryson* considered the *TNT* decision as important in construing the wording of section 6 of the Employment Relations Act. McGrath, J. considered it significant because section 6 was directed as a "reforming measure" to the definition of "employee" under the previous legislation whose principles are stated in the *TNT* case.

William Young and O'Regan JJ. considered that "the [TNT] case does not stand for absolute deference to party autonomy"(ibid, para 70), but listed three important features of the case as respect for contractual form, acceptance of the choice made by the parties and rejection of a pro-employment bias (ibid, para 69).

They rejected the applicant's submission that section 6 "did not change the law as stated in *TNT*" and rejected the submission that section 6(3)(a) and (b) "merely reiterate the old rule that contractual labels are not determinative of status." (ibid, para 104). They accepted that section 6 "proceeds on the basis that 'the real nature of the relationship' is not controlled by contractual terms and this is so even in cases where the contractual form adopted by the parties cannot be stigmatised as a sham." (ibid, para 105).

But although "the approach dictated by s6 is plainly not the same as that taken …in *TNT*", the majority still considered that "what was intended was more in the nature of a nudge rather than radical change in this area of law." (ibid, para 78).

The Traditional Tests and Intention

A final matter that the judgment leaves open is the role of the traditional "tests" often applied in these types of cases: the control test, the integration test and the fundamental test (see Deeks and Rasmussen 2002: 98-99). The majority considered that an analysis of the "real nature of the relationship" should not be restricted to those tests. They were concerned that an application of the traditional control, integration and fundamental

tests alone to determine the real nature of the relationship could leave little scope for significant weight to be placed on contractual intention (ibid, para 103).

Rather they held that there should be more "open textured" inquiry (ibid, para 101). They considered the fundamental test, as applied in the leading case of *Market Investigations v Minister of Social Security* (see para 184-185), encapsulated the intention of Parliament but noted that the criteria set out there were not exhaustive and did not take into account a case where the overriding industry practice was for workers to be engaged as independent contractors. They held that Shaw J. had applied the fundamental test incorrectly by comparing Mr Bryson with a builder or plumber rather than with others in his industry.

In the end, it seems that it was the parties' intention as expressed in the contractual terms, viewed in the light of current industry practice, that carried the day and this was seen as determining the real nature of the relationship.

So where does this leave the traditional tests as far as the new legislation is concerned? The control test and integration test receive little favour but possibly still have a life as part of the "open textured " approach. The fundamental test has received qualified endorsement – it can assist in determining what the "real nature of the relationship is". However, it seems it is not determinative if there is an overriding factor such as industry practice. What is left open is what the "open textured inquiry" should include where there is no overriding industry practice.

At the time of writing, an application has been filed to appeal this decision to the Supreme Court

References

de Bruin, A. and Depuis, A. 2004. 'Flexibility in the Complex World of Non-Standard Work: The Screen Production Industry in New Zealand.' *New Zealand Journal of Employment Relations*, 29(3): 53-66.

Deeks, J. & Rasmussen, E. 2002: *Employment Relations in New Zealand*, Auckland, Pearson Education.

Court Cases

Curlew v Harvey Norman Stores (NZ) Pty Ltd [2000] 1 ERNZ 114.

Koia v Carlyon Holdings Ltd [2000] ERNZ 585.

Market Investigations v Minister of Social Security [1969] 2 QB 173.

Three Foot Six Limited v Bryson [2004] CA 246/03.

TNT Worldwide Express (NZ) Ltd v Cunningham [1992] 2 ERNZ 1010 (CA).