New Zealand Journal of Employment Relations 36(3): 73-90

"...Where the Shadows lie": Confusions, misunderstanding, and misinformation about workplace status.

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Abstract

The "Hobbit" amendment was passed through the New Zealand Parliament under urgency on 28 and 29 October, 2010 with the declared intention of providing clarity and certainty about the status of workers involved in film production work. The public discourse surrounding the controversy that produced the "hobbit" amendment revealed considerable confusion, misunderstanding and misinformation about the law governing the status of workplace relationships. This article analyses the legislative provisions and common law principles governing employment status at the time the amendment was enacted, as confirmed in the leading case Bryson v Three Foot Six Ltd. From this basis, the article then considers the statutory interpretation of the amendment as enacted, concluding that the current wording does not provided the clarity and certainty its promoters intended.

Introduction

The Hobbit amendment was passed through the New Zealand Parliament under urgency on 28 and 29 October 2010 with the intention of providing "clarity and certainty about the status of workers involved in film production work" (Wilkinson, 2010a: 14940). The Minister of Labour, in introducing the Bill into Parliament, stated that amendment of the current law was necessary so that the film industry would "continue to make a significant investment in our economy and...film the *Hobbit* movies in New Zealand" (Wilkinson, 2010a: 14941).

Much of the media reporting surrounding the controversy that produced the Hobbit amendment revealed considerable confusion, misunderstanding and misinformation about the existing state of the law governing the status of workplace relationships. The *Bryson* case had provided a settled and relatively orthodox interpretation of the statutory requirements, which distinguish an employment agreement from contractor arrangements. According to the media coverage, however, concern persisted that, because of the *Bryson* case, workers who were "really" contractors could in some way be "deemed" to be employees by the court.
On TV3 News, for example, Duncan Garner (2010) reported that:

> The law change stops contractors suing their employer for wrongful dismissal,[1]so contractors can't argue they were an employee…Former *Lord of the Rings* model maker James Bryson was a contractor and took Sir Peter Jackson's company to court in 2005 – successfully arguing he should be treated as an employee.

Similar views were attributed to by Harper, 2010.

> Actor Mark Harrison, who started the Facebook group and organised rallies across New Zealand…Mr. Harrison did not have any concerns with the Government's planned legislative changes to ensure contracted film workers cannot later argue in court they were employees.

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> "This is an area that needed clarification ever since the [James] Bryson case," he said. "It should have been changed by the Labour Government."

And in December, Karyn Scherer's column (2010) described the "...now-infamous Bryson case which prompted the law change. Bryson is a former Weta model-maker who successfully argued before the courts that he was really an employee, even though he had been hired as a contractor.

Senior National Party politicians also publicly espoused a similar view of the *Bryson* case. On October 27, 2010, Cheng and Harper from the New Zealand Herald reported that:

> Speaking yesterday after meeting with the [Warner Bros] executives, Mr. Key said the "paramount" problem was that film workers on independent contracts could be legally seen as employees, even if their contracts specifically called them contractors. That followed a Supreme Court ruling in 2005 on James Bryson, a model maker on the *Lord of the Rings* movies, who was deemed an employee, even though he was hired as a contractor.

And in the First Reading debate on the Hobbit amendment, Gerry Brownlee (2010: 14944) stated that:

> Further, a wee time ago there was a case called the Bryson case. What came out of that was that if the inland revenue tests were applied in Bryson's case, it was deemed that he might not have been a contractor and that the relationship was more in the nature of employer-employee. ..if someone signs up and says that he or she wants to be a contractor, then where is the right for the person who is on the other side of that – the contractee – to expect that that is what the person is. I think it is utterly ridiculous to have a provision that says that people may run off at any time to the Employment Court and ask for help to change their status...But that is what happened in the Bryson case.

This article examines the relevant legislative provisions and their interpretation at the time the Hobbit amendment was enacted, before reviewing the concerns expressed above in light of the material law. The following sections of the article elaborate on the well-established principles of employment law applied in the *Bryson* case, concluding with a legal overview of the Hobbit amendment and its potential interpretation in light of existing employment law jurisprudence.

Legislative Provisions

Prior to the enactment of the Hobbit amendment, the provisions of the Employment Relations Act 2000 (ERA) governing whether a worker is an employee or contractor read as follows:

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
- 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.

These sections incorporated and expanded the statutory definition in the Employment Contracts Act 1991 (ECA), which now appears as s6(1)ERA. An employee is defined as "any person of any age employed by an employer to do any work for hire or reward under a contract of service". A 'contract of service' is a term from the common law to denote an employee, in contrast to a worker engaged under a 'contract for services' – a contractor. In s5 ERA the term is also used to define an employment agreement: "employment agreement...means a contract of service".

Traditionally, the common law distinction between these two working relationships has been established by applying a range of "tests" developed through the cases over the last century – the Control, Integration and Fundamental Tests.[2] These common law tests are imported into any consideration of the distinction between "employee" and "contractor" because the statute defines employment in terms of the common law. Presumably, the common law tests are the "inland revenue tests" to which Gerry Brownlee referred in the First Reading debate (above), though their ambit is wider than taxation issues. In New Zealand, the other usual context for determining employment status is to establish the right to access minimum code conditions and employment protection provisions, such as personal grievance dispute resolution. In other common law jurisdictions, leading cases have also arisen on issues such as vicarious liability for personal injury or intellectual property rights to a worker's outputs.[3]

In the *Bryson* Employment Court case, Judge Shaw summarised the principles to be applied to interpreting the expanded definition of "employee" in s6 ERA 2000 as follows:

- 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.

Subsequent Employment Court decisions have produced variants of wording in setting out the criteria for applying the statutory provisions but no substantive changes (see, for e.g. *Chief of Defence Force v Ross-Taylor* [2010], *Tsoupakis v Fendalton Construction Ltd*). The Supreme Court endorsed Judge Shaw's summary of the applicable principles:

> We are unable to find in her judgment anything concerning s6 which does not appear faithfully to reflect the words of the section... Judge Shaw accurately states what the Court

> must do and lists the matters which are relevant... The only criticism which might fairly be made of the Judge's list is that it does not expressly direct attention to the substantive contractual terms... but it is clear from the following section of the judgment, headed *"Conditions of employment"*, that she was very much alive to the need to begin by looking at the written terms and conditions..." (at [32] & [33]).

Common misconceptions

In the light of this analysis, the earlier quoted comments in the media and from Government ministers reveal several common misconceptions:

1. **A statement in an agreement or contract that a worker is a contractor is enough to make this so.** Referred to in case law as a "label argument", this misconception is that because the written document makes a statement that says that the worker is a contractor, that is what they are in law or in reality. Even the Minister, in introducing the legislation, appears to suggest that employment status is established in this way when she stated:

   > Under the current law, a previous agreement in relation to a person's employment status can be challenged and overturned by the courts. Despite what the contract or agreement states, the courts can look through it and decide whether the relationship is a contract for service, or a contract of service (Wilkinson, 2010a: 14941).

   However, long before the *Bryson* case[4], it was settled law that "labelling" a worker as either an employee or a contractor does not decide the matter. The courts will not recognise an arrangement that it finds to be a "sham", designed by the parties in collusion for the purpose of evading legal obligations, irrespective of whatever label the parties may decide to attach to the situation; and even where the situation is not a "sham", the label will not be taken as determinative or given much weight as against other factors that the court must take into account.

   In *Cunningham v TNT Worldwide Express (NZ) Limited,*[5] four out of the five members of the Court of Appeal made comments in separate judgments on the weight to be attached to a "label" clause in deciding if the courier driver, Mr. Cunningham, was an employee or a contractor.

   Cooke (1976) cited clause 7 of the written agreement between the parties:

   > 7. THE relationship between the Contractors and the Company is and shall be for all purposes that of independent Contractor and neither this Agreement nor anything herein contained or implied shall constitute the relationship of employer and employee between the parties.

   He commented "I set out here cl 7,although being a mere label it is in itself of little or no importance (see *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817)..."

   Casey, J said, "The tribunal approached the matter in this way, correctly placing little weight on the fact that cl 7 specified the relationship to be that of employer and independent contractor."

   McKay, J said:

   > In this case the contract includes a clause stating that the relationship between Mr. Cunningham and the company is that of independent contractor and not that of employee and

> employer. The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates, and not by the label the parties put on it. At most that label may be an indication of intention which may assist in resolving any doubt as to the construction of other clauses.

Robertson, J said: "The fact that in the written contract they declared that Mr. Cunningham was an independent contractor and not an employee is not determinative."

Though the Court of Appeal in this *TNT* case found the courier driver to be an independent contractor, it did **not** do so on the basis of a statement in the contract labelling his employment status. The Employment Relations Act 2000 (ERA) in s6(3) now specifies that "the Court or Authority...is not to treat as a determining matter any statement by the persons that describes the nature of their relationship."

However, the *Bryson* Employment Court decision did acknowledge that, while not decisive, a written statement of employment status cannot be disregarded "if it reliably indicates the real nature of the relationship" and that it remains "an element to be considered"(at [24]). The relative importance of all the factors to be weighed up in determining employment status is considered in greater detail below.

2. **The second misconception is that employment status can arise in some "real world" dimension where it exists quite separately from the legal rules** which define the workplace relationship as that of a contractor or employee. However, a worker is an employee or a contractor because the law, as applied by the courts, defines that worker as either one or the other.

   Alterations in the law may occur through statutory amendment or through case law development which change the rules that determine employment status. But "being a contractor" or "being an employee" is a construct created by applying the legal rules to the factual situation; and ultimately, it is for the courts to determine the outcome of this process. When Mr. Bryson was working for Three Foot Six Ltd, there was no point at which he could have been "hired as a contractor" or have been "a film worker on an independent contract" because the courts found that he was an employee.[6] Similarly, there cannot be "a previous agreement in relation to a person's employment status" which is then "challenged and overturned by the courts" as the Minister asserted in the First Reading debate. The existence and nature of the agreement and the employment status of the person are determined by the Court's application of the relevant law to the facts of the case. It is for the courts to decide if the agreement exists, what it says and what employment status it establishes. The agreement or the employment status does not have any separate existence apart from this construction.
   Furthermore, in terms of work carried out in the film production industry, there is no intrinsic predisposition towards either employment or contracting as the legal structure for working relationships. In some common law jurisdictions, it is the practice for work in the industry to be carried out by unionised employees pursuant to collectively negotiated agreements. The Hobbit amendment seeks to establish the contrary presumption in the New Zealand jurisdiction. However, the nature of the work itself does not establish some inherent bias towards one form or the other of engaging workers.

3. **The third misconception is that perceived legal confusion or difficulties, which the Hobbit amendment was intended to redress, were created by the *Bryson* case.** However, as we have seen above, a statement in a written document specifying that Mr. Bryson was a contractor was

> never, in itself, going to be enough to make him a contractor. The law was already clear long before the *Bryson* case. The genesis of the amendment was not in any confusion over the law but in the Supreme Court's unequivocal confirmation that the law as applied in his particular situation, defined Mr. Bryson's working status as that of an employee. This meant that the law applied to everyone **even to the film industry**.

The *Bryson* decision applied well-established principles of employment law. The decision that Mr. Bryson was an employee was made by a Judge in the Employment Court on a plain reading of the applicable provisions of ERA 2000 in light of settled principles of common law. The decision was appealed to the Court of Appeal which found that Mr. Bryson was a contractor.[7] However, a bench of five Supreme Court Justices, hearing the first employment law matter to come before that body, unanimously found that the Employment Court judge had not made any error of law in reaching the decision that Mr. Bryson was an employee. In the subsequent five years, this correct understanding of the applicable law was not challenged or appealed in further decisions on the contractor/employee issue.

The six bullet points in Judge Shaw's decision provide a framework for discussion of the major legal issues that arose in the *Bryson* case – the real nature of the relationship in light of the written document, the weight to be attached to the intention of the parties, the continuing relevance of the common law tests and the significance of industry practice as a determining factor. We will now turn to examining this law in more detail.

Role of the written document

Mr. Bryson was offered a permanent position in April, 2000 as an on set model technician with Three Foot Six Ltd, following a two week secondment from Weta Workshop, where he had worked as a model-maker. For the first few weeks he received training. Despite negotiating his hours of work and receiving a pay rise in the intervening period, he was not supplied with any written document until October, 2000.Months after commencing work, he reluctantly signed a company-generated weekly invoice with a "crew deal memo" on the reverse, as a condition of continuing to be paid.

Judge Shaw's analysis of the document provided a detailed description of the terms and conditions, including an annexure of a full copy at the end of the judgment. She commented that it "is questionable whether the crew deal memo reliably indicates the real nature of the contract," (at [32]) and the Supreme Court ruled (at [32]) that it was open to her to reach this conclusion. She concurred with the Authority's recognition that there were elements in the memo indicative of an employment relationship.

> In spite of the references to independent contractor in the crew deal memo much of it reads like a contract of service. Even a provision such as the one which records no entitlement to annual and sick leave is compromised by the later statement that payment could be made for sick leave at the discretion of the production company" (at [74]).

The document included a clause specifying that Mr. Bryson was engaged as an independent contractor, not an employee, and referred throughout to the worker as a contractor. The Supreme Court concurred with Judge Shaw in noting that "s6(3)(b) requires that the statement in the crew deal memo that Mr. Bryson was an independent contractor is not to be treated as determinative" (at [32]), and commented that "[i]n that respect s6 confirms what is to be found in *TNT*."

However, the *TNT* decision may also be taken to establish that employment status was to be determined by discerning the intention of the parties from an interpretation of the wording and effect of the comprehensive written terms of the contract. Although expressed in slightly different terms, each of its five judgments focussed on a classical, formal contractual analysis of the intention of the parties at the moment of formation as set out in the written contractual document.

For example Cooke said:

When the terms of a contact are fully set out in writing which is not a sham... the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined (*Cunningham v TNT Worldwide Express (NZ) Limited* [1993] at 701)

Casey J (ibid at 711) stated

> The parties signed a written contact and it can be assumed that they were working in accordance with its terms. On ordinary principles of construction their intention about the nature of their relationship is to be arrived at from a consideration of the contents of that document read in the light of all the surrounding circumstances at the time of its execution…

And Hardie Boys, J:

> The case is about the meaning and effect of a written contract. The Court's function is to ascertain the intentions of the parties when they entered into it. That intention is to be ascertained from the words they used, with such assistance as can be found in the surrounding circumstances.

Not surprisingly, then, the *TNT* decision was generally considered to stand for the importance of the terms of the written contract in determining the status of a person as an employee or an independent contractor. For example in *Koia v Carlyon Holdings Ltd*, Judge Colgan stated:

> Under the Employment Contracts Act 1991, the clearly expressed contractual intentions of the parties prevailed over all other considerations: … So if the contract was wholly reduced to writing, that was the end of the inquiry" (ibid at 594).

The extended definition of "employee" found in s6 ERA 2000, however, requires that "the Court or the Authority... must determine the real nature of the relationship" and "must consider all relevant matters, including any matters that indicate the intention of the persons". In applying the wording of the statute, Judge Shaw's questioning of "whether the crew deal memo reliably indicates the real nature of the contract" indicates a reduced deference to contractual form as determining employment status. The Supreme Court decision found that, with the replacement of the ECA 1991 by the ERA, the "Court or Authority must therefore, even when the written contract is apparently comprehensive, take into account other matters which are relevant" (at [23]).

The important implication of this position is that s6 mandates that the inquiry undertaken by the Court or Authority is "for the purpose of determining a question of fact" (at [23]). The Supreme Court decision comments that the appeal in the *TNT* case "appears to have proceeded on the basis that the employee/contractor question was open to appeal as a question of law because the case was of the exceptional kind" (at[22]). The SC quotes Cooke in *TNT* as saying that, because the contract was wholly in writing, the *TNT* case must turn on the correct interpretation of the contract, which is a matter of law, although in more typical employment cases the question of classification is one of "mixed fact and law" (at[22]).

However, now that the Supreme Court has ruled that the inquiry undertaken under s6 ERA 2000 is one of fact, the "ultimate conclusion reached by the Court in a given case concerning the nature of

the relationship is thus not ordinarily amenable to appeal to the Court of Appeal under s214" (at [23]). Whether or not the appellate Judges might have reached a different conclusion, they cannot hear an appeal from the Employment Court decision unless an error of law can be established, and interpretation of the written documentation no longer provides the foundation for an appeal as a matter of law.

The intention of the parties

Under Judge Shaw's second bullet point, the intention of the parties is still relevant but no longer decisive. As the employment relationship is formed by agreement, it is always necessary that any intention of the parties about the worker's employment status should be a common intention. The Employment Court judgment found that it was not possible to establish if any common intention existed.

> The absence of any written record of engagement at the commencement of his work for Three Foot Six means that there is no evidence of any mutual turning of minds to the true nature of Mr. Bryson's employment at that stage" (at [36]).

The majority in the Court of Appeal had been concerned that Judge Shaw's approach to determining the nature of the employment relationship could leave little scope for significant weight to be placed on contractual intention. The Supreme Court however, "did not read her judgment in that way" [33]. They found that "[s]he considered the terms and conditions" [33] and "made a factual finding that it was not possible to establish if the parties had any common intention as to their working relationship"([9] p 379). Mr. Bryson, she found, "did not turn his mind to the matter". The "Three Foot Six witnesses" ([9] p 380) assumed that he was a contractor because they said that was invariable industry practice. However, Judge Shaw looked for "any mutual turning of minds to the true nature of his employment" ([9]p 380) and said that the assumptions of the employer about the employment status of the worker "could not be taken as determinative" ([9] p 380).

In light of this analysis, the comments by Gerry Brownlee (2010) in the First Reading debate appear to indicate a misunderstanding of the case law. The Judge made a factual finding that Mr. Bryson did not sign up and say that he wanted to be a contractor – that he did not "turn his mind to the matter" at all so there was no common intention as to Mr. Bryson's employment status. It was, in fact, Mr. Brownlee's "contractee" who incorrectly assumed what the status of the working relationship was. Mr. Bryson could not "run off at any time to the Employment Court and ask for help to change his status" when a correct analysis established that he was and had always been an employee.

Judge Shaw's third bullet point deals with contractual statement by the parties about the nature of the employment relationship or labels which we have already discussed above. We now turn to the fourth and fifth bullet points which relate to establishing the real nature of the employment relationship through applying the historic common law tests.

The common law tests.

We have already noted that the common law tests are imported into an analysis of employment status because the statutory definition of "employee" is expressed in terms of the common law concept of "contract of service". Following detailed analysis, Judge Shaw concluded that the application of these traditional tests did support the contention that Mr. Bryson was an employee. There was

significant control imposed over Mr. Bryson's work, and how and when he did it. He required about six weeks training after he started with Three Foot Six "because he had no previous experience in the techniques...This training indicates he was not employed in his area of expertise, namely model-making. He was required to learn new skills..." (at[39]). "Mr. Bryson was required to be at work between specified hours each day and to perform the duties as directed on a day to day basis" (at [48]). Though he did use some of his own tools there was no requirement for him to supply any tools or equipment and, in practice, damaged or lost personal tools were replaced.

Judge Shaw also found that Mr. Bryson's work was an integral part of Three Foot Six business and that, apart from his tax status, there was no evidence at all of Mr. Bryson operating a business on his own account.

> He had no separate legal identity as a trust, a company, a partnership, or even as a sole trader. His income from Three Foot Six was not linked in any way to the profits or losses made by that company. He was paid a regular wage based on an hourly rate. The invoices that he was paid on were generated by Three Foot Six and not by Mr. Bryson himself and appear to be a device to record the hours worked..."(at[57]).

The role of the traditional tests, in determining the nature of the employment relationship, was specifically affirmed by the Supreme Court. " 'All relevant matters'…clearly requires the Court or the Authority to have regard to features of control and integration and 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." A prerequisite to applying these tests is to consider the terms and conditions of the contract and how it operates in practice (pp 386-387).
The Supreme Court found no error of law in Judge Shaw's statement "that the real nature of the relationship could be ascertained by analysing the tests that have been historically applied… "although "obviously" they could not "be applied exclusively" (p. 387). The Supreme Court found that "[s]he correctly used them, in conjunction with the other relevant matters to which she referred, in an endeavour to determine the real nature of the relationship , as directed by s6(2)" (p 387).

Industry practice

Every level at which this case was heard, dire consequences for the film production industry were predicted if Mr. Bryson was found to be an employee. In the Employment Court, Judge Shaw said:

> It is clear from the evidence that the defendant and the film and television industry in general has a real and genuine concern that any changes to the present employment arrangements which have been in place for many years will cause significant disruptions in the film industry with potentially adverse outcomes both in economic terms and in terms of attracting overseas film companies to bring the productions to New Zealand...Whilst these concerns are acknowledged, I am of the view that, in the context of this case, they are overstated (at [68]).

In finding that Mr. Bryson was an employee, she emphasised "that the decision in this case is based solely on the individual circumstances of Mr. Bryson's employment and is not to be regarded as affecting the as yet untested status of any other employee in the film industry" (at [75]).

In the Court of Appeal, although the Employment Court decision was objected to on a number of grounds, it appeared that ultimately it was the consideration of industry practice that lead the majority to conclude that Mr. Bryson was a contractor. "It seems to us," said the majority that the

approach taken by Judge Shaw in effect involves a claim to require the restructuring of the way in which the film industry operates" (at [113]) (for more information, see Nuttall and Reid, 2005).

The dissenting judgment, however, vigorously disputed this approach. McGrath, J said:

> ...to say that film industry workers are all independent contractors is a label argument. This Court is required by the 2000 Act to assess the real nature of the respondent's relationship with the appellant and to determine its individual character... While it might be said that the respondent is an ordinary worker in an industry where such persons are independent contractors, there is a risk in applying such an argument that a whole industry will be treated as excluded from the provisions of the Act where nothing in the language of the statute indicates an intention to deal with engagements on an industry wide basis... It is accordingly not open in my view to the Court under the definition of "employee" in the 2000 Act to reach a decision that has general application to the film industry... (at[33] and [35]).

The Supreme Court found that Judge Shaw "did not overlook or ignore the evidence of industry practice" and that what she "said in relation to industry practice" did not amount to legal error. (p88). She had found that "industry practice was not helpful in relation to establishing the common intention of Mr. Bryson and Three Foot Six…" (p 388).The Supreme Court decision recognised that Judge Shaw's view was that "Mr. Bryson's position was **not** similar to that described by the witnesses of industry practices" (p 388) and that industry practice was given little weight in her assessment because his working conditions "did not appear to be typical of the industry" (p 388). However, any concern that this implies all film industry workers would be classified as employees would be as much of a "label" argument as deciding that they must all be contractors.

The Supreme Court decision in *Bryson v Three Foot Six Ltd* reinstated a traditional, straight forward approach to determining employment status. For five years, the upshot of the *Bryson* case was that decisions about employment status continued to be based on the usual analysis of the relevant factual matrix in any given situation at Employment Court level. None of these decisions were appealed and films continued to be made in New Zealand. According to a New Zealand Herald report

> Mr. Key did not know why an issue from a 2005 court case was now the main problem for Warner Bros, given that it should be no more of an issue than it was before the boycott was called, when there was no question the films would be shot anywhere but New Zealand (Cheng, 2010).

Perhaps, the answer might be sought in the rationale for distinguishing employees from contractors. New Zealand precedent is about eligibility for minimum code conditions and access to personal grievance procedures, but the distinction is also crucial under s83 ERA 2000 as to when participation in industrial action is lawful. Even the restricted statutory right to strike under New Zealand law does not extend to independent contractors.

The Hobbit amendment

The Hobbit amendment altered the definition of "employee" in s6 ERA 2000 by adding s6(1)(d), s6 (1A) and s6(7) as set out below:

6. **Meaning of employee**

1) In this Act, unless the context otherwise requires, **employee-**

....

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

....

7) In this section –

film means a cinematograph film, a video recording, and any other material record of visual moving images that is capable of being used for the subsequent display of those images; and includes any part of any film, and any copy or part of a copy of the whole or any part of a film

film production means the production of a film or video game

film production work –

(a) means the following work performed, or services provided, in relation to a film production:
(i) work performed, or services provided, by an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer (whether as an individual or not):
(ii) pre-production work or services (whether on the set or off the set):
(iii) production work or services (whether on the set or off the set):
(iv) post-production work or services (whether on the set or off the set):
(v) promotional or advertising work or services (whether on the set or off the set) by a person referred to in subparagraphs (i) to (iv); but

(b) excludes work performed, or services provided, in respect of the production of any programme intended initially for broadcast on television

video game means any video recording that is designed for use wholly or principally as a game

video recording means any disc, magnetic tape, or solid state recording device containing information by the use of which 1 or more series of visual images may be produced electronically and shown as a moving picture

What did the Government intend[8] to achieve by this amendment?

In the Explanatory note to the amendment when first introduced as a Bill to Parliament, the General policy statement reads:

> This Bill amends the Employment Relations Act 2000 so that workers involved with film production work will be independent contractors rather than employees, unless they choose to be employees by entering into an agreement that provides that they are employees. Film production work includes production work for video games, but not production work on programmes initially intended for television.
>
> The Bill reflects common practice for film-related work. The Bill provides clarity and certainty about the status of workers in the film industry; it provides assurance that workers

> involved in the film industry can be independent contractors, and will help prevent unnecessary litigation (Legislation NZ, 2010).

In introducing the Bill, the Minister of Labour stated:

> The bill makes it clear that the status of these workers as contractors or employees is based on the decision they make at the beginning of the employment relationship[9]. If they sign on as independent contractors, they are independent contractors. If they sign on as employees, they are employees (Wilkinson, 2010a: 14940).

It would appear, then, that what the Minister is seeking here is to validate the "label" argument, referred to by McGrath, J in his Court of Appeal dissent, which excludes a whole industry from the protections of the ERA 2000 on the basis of how the worker's status is described in the written document. This view is supported by the Minister's further statements in the Second Reading debate:

> This bill amends the Employment Relations Act 2000 so that it is clear that a person involved in film production work either is an independent contractor or is an employee, based on his or her employment agreement[10]. This status cannot be challenged in court. The issue is described by employment law specialist Peter Cullen, who says: "If they sign a document saying they're contractors, then that should be the end of it (Wilkinson, 2010: 14961).

In attempting to achieve this end, the amendment creates a broad exclusion from the definition of "employee" for all film production workers. The category of excluded workers is more fully identified by the definitions in s6(7).

However, as the Minister indicated in her Third Reading speech, the Bill

> ...recognises that in some instances the parties may agree that rather than a contract for services, an employment relationship is more appropriate in particular circumstances. In those cases, the parties can enter into an employment agreement that provides that the worker is an employee and therefore will be covered by the employment relations legislation" (Wilkinson, 2010b: 15048).

Accordingly, s6(1A) provides an exemption from the blanket exclusion of film workers from employee status "if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee."

It seems, then, that the Government intended that the effect of the Hobbit amendment would be that all workers in the film industry would be contractors unless an employment agreement provided that they were employees.

Interpreting the amendment

As this Hobbit amendment was enacted under urgency, we have only restricted extrinsic materials from which to make further assessment of the legislative policy from which it arose. The entire general policy statement in the Explanatory Note is quoted in the section above, there were no Select Committee hearings or Report and the Minister made three brief speeches, which are already extensively excerpted above.

We do, however, have the example of two other industries where legislative intervention has restricted the employment status of workers. The enquiry mandated by s6(2) and (3) ERA 2000 into the real nature of the employment relationship does not limit or affect the Sharemilking Agreements Act 1937 or the Real Estate Agents Act 2008. Sharemilkers are explicitly excluded from employment status: "the relationship of the parties is that of farm owner and independent contractor and not that of employer and employee, nor that of a partnership" (Sharemilking Agreements Act 1937 s16).[11]

Real estate salespeople "may be employed by an agent as an employee or may be engaged by an agent as an independent contractor", but under s51(2) Real Estate Agents Act 2008: "any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor."

So sharemilkers are always independent contractors and real estate salespeople are always independent contractors when there is a written agreement which explicitly states that they are independent contractors.

However, the Hobbit amendment comes at the issue from a different direction. The amendment does not say that all film industry workers are contractors or that all film industry workers, who have a contract specifying that they are contractors, are contractors. What the amendment says is film workers are excluded from being employees but this exclusion does not apply if they are employees. How do we know if they are employees? They will be a "party to, or covered by, a written employment agreement that **provides**" that they are employees.

The legislative exemption to the exclusion from employee status does not say that the written employment agreement must "expressly state" that they are employees. So, in interpreting the exemption, there are two enquiries:

1. Is the worker a party to, or covered by, a written employment agreement?
2. Does the agreement "provide" that the worker is an employee?

How do we answer the first question? The definition of an employment agreement under s5 ERA 2000 is that it is a "contract of service". The common law discerns whether an agreement is a contract of service by applying the established common tests discussed above. The ERA s6(2) says that we decide if someone is employed under a contract of service by determining the "real nature of the relationship". The Supreme Court said that when Judge Shaw summarised the requirements for determining how to recognise a contract of service in the six "bullet points" in her judgment she made no error of law. It seems that in order to decide whether the agreement governing the working relationship between the film worker and the employer is a "contract of service", we are back to the same enquiry conducted in the *Bryson* case; and in this situation both the common law and the statute provide that a "label' argument is not conclusive.

How do we decide if the agreement "provides" that the worker is an employee? The legislation does not say that exemption from the exclusion from employee status requires that the agreement expressly or explicitly states that they are an employee. So deciding whether the agreement "provides" that the worker is an employee is also likely to involve the same enquiry as that necessary to answer question one.

These drafting issues were pointed out during the passage of the Hobbit enactment by Charles Chauvel and the Government's response was to introduce a Supplementary Order Paper (SOP) at the Third Reading stage of the amendment's enactment changing the proposed wording of s6(1A) from "employment agreement" to "written employment agreement". What would the situation be if the agreement were not in writing?

The enquiry to be undertaken here would also involve two questions:

1. Is this unwritten agreement an employment agreement?
2. What is the effect in terms of s6(1A) ERA 2000 of the agreement not being in writing?

The established jurisprudence provides guidance to the Courts in finding, in the absence of writing, whether an agreement is an employment agreement (for e.g. *Muollo v Rotaru, 1995*). Evidence should be admissible of expressions of intention of the parties by oral declarations of intention or evidence of their conduct at the time of the formation of the agreement. Where the Court finds there is an employment agreement which has not been reduced to writing, what is the effect of the requirement under s6(1A) that a worker is exempt from the blanket exclusion from "employee" status by means of a written employment agreement?

A collective agreement has no effect if it not in writing and signed by the parties (ERA 2000 s54(1)). While an individual employment agreement must also be in writing, when bargaining for an individual employment agreement, the onus is on the employer to provide a written copy of the intended agreement to the other party and to retain a copy (ERA 200 s63A(2) and s64(2)). The statute specifically provides that employer non-compliance does not affect the validity of the employment agreement (ERA 2000 s63S(4)). The Court of Appeal has also upheld the position that the lack of writing does not render the individual employment agreement unenforceable. In *Warwick Henderson Gallery Ltd v Weston,* the Court stated that to find the agreement unenforceable would be:

> ...inconsistent with the language and policy of the ERA construed in accordance with standard principles of statutory interpretation and indeed with the employee's entitlement under article 23 of the Universal Declaration of Human Rights to just, as well as favourable, conditions of work [at 15].

The Court said:

> It would be an extraordinary result if, while breach of s 64(2) does not affect the validity of the individual employment agreement, a result explicitly stated by the section, that very agreement should somehow by implication from s 65(l)(a) become unenforceable as not being in writing [at 23]

Whether the courts would also find that an employment agreement which had not been reduced to writing was enforceable to provide employment status in the context of s6(1A) remains moot. The developing jurisprudence on implementation of "90-day trial periods" (see *Heather Smith v Stokes Valley Pharmacy, 2009 Ltd, 2010; Blackmore v Honick Properties, Ltd, 2011*), however, suggests that the Employment Court, at least, will uphold strict construction of legislative provisions which remove access to justice, and it seems unlikely that this would not apply to an amendment which removes an entire industry from statutory employment protections.

What is clear, though, is that the Hobbit amendment has not provided clarity and certainty as to the employment status of film production workers, and that the amendment does not ensure that employment status in this industry cannot be challenged in court.

Conclusion

It is of concern when public discourse around statutory change reflects a level of inaccuracy and misunderstanding about what the law is, and how it has been interpreted by the courts. John Hughes has commented on an analogous situation in relation to the changes to the test for unjustifiable dismissal under s103A ERA 2000. The persistent and pervasive view that it is sufficient to specify employment status in an agreement is misleading as to the law prior to the enactment of the Hobbit amendment, but also most unfortunate in the expectations it raises as to what the amendment may have achieved. This article makes the case that the Hobbit amendment was based on a misconceived view of the previous jurisprudence and that it is not, in fact, effective to ensure clarity and certainty as to the employment status of film production workers.

Notes

[1] Under the current statute, everyone is prevented from suing in wrongful dismissal, which is a common law cause of action. Presumably, the intended reference is to the statutory process of bringing a personal grievance on the grounds of unjustifiable dismissal. If a worker is a contractor they do not have an employer – the other party to the contract is the principal.

[2] Control Test : No longer the sole determining factor (*Cunningham v TNT Worldwide Express (NZ) Limited* [1993] 3 ERNZ 695 CA), this test now asks whether there is a right to control a purported employee's actions and how or when they must do them. This right is irrespective of whether or not continued, detailed oversight is actually exercised. The question is whether the ultimate control lies elsewhere than with the worker (*Challenge Reality Ltd v Commissioner of Inland Revenue* (1990) 3 NZLR 42).

Integration Test: "In a contract of service a person's work is integral part of the business whereas under a contract for services the work is not integrated into it but accessory to it" *(Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101)

Fundamental Test: Is the person who has engaged him/herself to perform the services performing them as a person in business on his/her own account? If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service" (*Market Investigations v Minister of Social Security* [1968] 2 QB 173).

[3] *Hollis v Vabu Pty Ltd* [2001] HCA 44 decided the issue of vicarious liability for personal injury by accident caused by bicycle couriers.

[4] For analysis of the Court of Appeal decision in the Bryson case see Nuttall and Reid, 2005; For comment on the Court of Appeal and Supreme Court decision in a more general legislative context see Nuttall (2007:).

[5] *Cunningham v TNT Worldwide Express (NZ) Limited* [1993] 3 ERNZ 695 (CA). The leading case about employment status decided under the Employment Contracts Act 1991.

[6] This point is most strikingly illustrated in *Bryson v Three Foot Six Ltd* [2005] ERNZ372 (EC) by the submissions of counsel for Three Foot Six Ltd.The *Bryson* case returned to the Employment

Court because the Employment Relations Authority found that Mr. Bryson had raised his grievance out of time. It was argued to the Employment Court that "exceptional circumstances" applied, and that the grievance could be raised out of time because the "crew deal memo" did not contain the clause relating to resolution of employment problems required under s65 and this constituted "exceptional circumstances" under s115(c). Judge Shaw's decision said:

> [44] For the defendant, Ms Muir submitted that the crew deal memo which governed Mr. Bryson's employment was not intended to constitute an employment agreement but rather an independent contract and it would be unjust to infer that s115(c) should apply retrospectively. [45] I do not accept that submission. However, the defendant characterised the crew deal memo at the time that it was presented to Mr. Bryson, his employment had been conclusively found to have been that of an employment relationship. This relationship commenced when he began working for Three Foot Six Ltd and continued until he was made redundant. The requirement for the explanation concerning the resolution of employment relationship problems was required by s65 from 2 October 2000 when the Employment Relations Act 2000 commenced. It is not a case of applying s115(c) retrospectively. The law applied to Three Foot Six Ltd from that date.

[7] For analysis see Nuttall and Reid, 2005, above at n9. However, the SC decision undermined any basis for the case to have gone to the Court of Appeal, since leave to appeal requires that the decision of the Employment Court must be found to be wrong in law. "An appeal cannot however be said to be on a question of law where the factfinding Court has merely applied law which it has correctly understood to the facts of the individual case" *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [25]).

[8] Note that the policy intention of a Government in introducing legislation into Parliament does not necessarily equate to the "intention of Parliament" referred to in the rules of statutory interpretation.

[9] Presumably this also refers to the contracting relationship.

[10] Of course an independent contractor does not have an employment agreement but presumably this was intended to refer to any contract of engagement to work.

[11] The exclusion of agricultural workers from the ambit of industrial conciliation and arbitration was one of the factors that ensured the passage of the original legislation in 1894 and the continuation of the award system in 1908. See James Holt. (1986). *Compulsory Arbitration in New Zealand: the First Forty Years.* Auckland: AUP. pp24-25, 76-88.

References

Brownlee, G. Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Week 58, Volume 668).* (pp. 14945-15006). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/NR/rdonlyres/45A0CF3F-AF88-40E3-B045-B5B873BD9BF5/180605/49HansD_201010296.pdf

Cheng, D. (2010, October 27). Employment law in the spotlight. *New Zealand Herald.* Retrieved from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10683282

Cheng, D. and Harper P. (2010, October 27). PM: I'm not going to write cheque NZ can't afford. *New Zealand Herald.* Retrieved from http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10683389

Garner, D. (2010, October 28). How The Hobbit Came to Stay in NZ. *3 News.* Retrieved from http://www.3news.co.nz/How-The-Hobbit-came-to-stay-in-NZ/tabid/418/articleID/183575/Default.aspx

Harper, P. (2010, October 28). Fans Enthusiastic about *Hobbit* Deal. *New Zealand Herald.* Retrieved from http://www.nzherald.co.nz/employment-relations/news/article.cfm?c_id=189&objectid=10683644

Hughes, J. (2011). Interpreting the new justification test: Part 1. *Employment Law Bulletin.* 13-18

Hughes, J. (2011). Interpreting the new justification test: Part 2. *Employment Law Bulletin.* 25-34

Legislation NZ. (2010). Employment Relations (Film Production Work) Amendment Bill. Government Bill 229-1. Retrieved from http://www.legislation.govt.nz/bill/government/2010/0229/latest/whole.html

Nuttal, P. (2007). There and back again: Shaping the employment contract in the Antipodes. *International Employment Relations Review.* 13(1): 43-55

Nuttall, P. and Reid, P. (2005). Employee of Independent Contractor? Comments on: Three Foot Six Limited v Bryson (CA 246/03, 12 November 2005). *New Zealand Journal of Employment Relations.* 30(1): 87-92

Scherer, K. (2010, December 3). The Big Picture. *New Zealand Herald.* Retrieved from http://www.nzherald.co.nz/government-spending/news/article.cfm?c_id=221&objectid=10691502

Wilkinson, K. (2010a). Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Week 58, Volume 668).* (pp. 14945-15006). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/NR/rdonlyres/45A0CF3F-AF88-40E3-B045-B5B873BD9BF5/180605/49HansD_201010296.pdf

Wilkinson, K. (2010b). Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Continued on Friday 29 October 2010) (Week 58, Volume 668).* (pp. 15007-15064). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/NR/rdonlyres/929A1EA5-3505-4CFA-B4E6-EC1FB7BEFEAC/180627/49HansD_201010299.pdf

Cases

Blackmore v Honick Properties Ltd [2011] NZEmpC 152

Bryson v Three Foot Six Ltd [2003] 7 NZELC 97,317; [2003] 1 ERNZ 581; (2003) 2 NZELR 105 (EC),

Bryson v Three Foot Six Ltd [2003] 1 ERNZ 581 (EC)

Bryson v Three Foot Six Ltd [2005] ERNZ372 (EC)

Bryson v Three Foot Six Ltd [2005] NZSC 34,

Bryson v Three Foot Six Ltd ERA Wellington WA1/03, 7 January 2003.

Challenge Reality Ltd v Commissioner of Inland Revenue (1990) 3 NZLR 42

Chief of Defence Force v Ross-Taylor [2010] NZEmpC 22,

Cunningham v TNT Worldwide Express (NZ) Limited [1993] 3 ERNZ 695 (CA)

Heather Smith v Stokes Valley Pharmacy (2009) Ltd [2010] NZEmpC 111

Hollis v Vabu Pty Ltd [2001] HCA 44

Market Investigations v Minister of Social Security [1968] 2 QB 173

Muollo v Rotaru [1995] 2 ERNZ 414

Stevenson, Jordan & Harrison v MacDonald & Evans [1952] 1 TLR 101

Three Foot Six Ltd v Bryson (2005) 7 NZELC 97,653; [2004 2 ERNZ 526; (2004) 2 NZELR 29 (CA)

Tsoupakis v Fendalton Construction Ltd EC Wellington WC16/09, WRC36/08; 18 June 2009.

Warwick Henderson Gallery Ltd v Weston [2005] ERNZ 921 (CA).