IN THE COURT OF APPEAL OF NEW ZEALAND

CA588/2015
[2016] NZCA 20

BETWEEN	GRAHAM D'ARCY-SMITH Applicant
AND	NATURAL HABITATS LIMITED Respondent

Hearing: 15 February 2016

Court: Wild, Winkelmann and Kós JJ

Counsel: Applicant in person
L Herzog for Respondent

Judgment: 19 February 2016 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs for a standard application for leave to appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

[1] Mr D'Arcy-Smith seeks leave under s 214 of the Employment Relations Act 2000 to appeal a judgment given on 28 July 2015 by Judge Inglis in the Employment Court.[1]

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[1] *D'Arcy-Smith v Natural Habitats Ltd* NZEmpC Auckland [2015] NZEmpC 123.

[2] Section 214 relevantly provides:

> **214 Appeals on questions of law**
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> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the court (other than a decision on the construction of an individual employment agreement …) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision …
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> …
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> (3) The Court of appeal may grant leave accordingly if, in the opinion of that court, the question of law involved in that appeal is one that, by reasons of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[3] Mr D'Arcy-Smith worked for the respondent for a little over a month commencing 18 June 2013. The work arrangement was then terminated by the respondent.

[4] In her judgment Judge Inglis found Mr D'Arcy-Smith was an independent contractor to the respondent and was not employed by it. The grievance procedures in the Employment Relations Act apply only to employees. Accordingly the Judge dismissed Mr D'Arcy-Smith's claim that he was unjustifiably dismissed.

[5] There is no challenge to Judge Inglis' analysis of the law relevant to determining whether Mr D'Arcy-Smith's relationship with the respondent was an employment one, or as an independent contractor. The Judge referred to s 6 of the Employment Relations Act and to the tests laid down by the Supreme Court in *Bryson v Three Foot Six Ltd*:[2]

> It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or 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. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

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2 At [10], citing *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [32].

[6] Having stated the legal test she was applying, the Judge then set about an analysis of the evidence she had heard. She made findings of fact and, where the evidence conflicted, findings of credibility also.

[7] Judge Inglis' conclusion was this:

> [55] The inquiry into the nature of the relationship is an intensely factual one. It will be apparent from the foregoing that there are factors that point both towards, and away from, an employment relationship. That is not unusual in cases such as this. However I consider that the real nature of the relationship was not one of employer/employee. The parties agreed, at the outset of what was intended to be a short-term relationship (and which ultimately turned out to be even shorter), that Mr D'Arcy-Smith would be engaged as a labour-only contractor. The way in which payment issues were subsequently dealt with is consistent with such a relationship, and consistent with the parties' agreement reached shortly beforehand. The factors pointing in the opposite direction are relevant, but must be viewed in context.
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> (footnote omitted)

[8] It suffices to give three examples of the sort of factual findings the Judge made:

(a) In the curriculum vitae Mr D'Arcy-Smith had given the respondent when seeking work, he had described himself as "Casual Consultancy/Contractor". The Judge found that Mr D'Arcy-Smith's discussions with Mr Stevenson of the respondent up to the time he started work, and the basis on which he was engaged, were consistent with that description.[3]

(b) She found the parties had not signed either a written employment agreement or a written independent contractor agreement. In the absence of either type of agreement this was a neutral factor.[4]

(c) The respondent picked Mr D'Arcy-Smith up each morning and took him in one of its vehicles to the work site and provided him with all necessary tools and equipment. He worked always under the close

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3 *D'Arcy-Smith v Natural Habitats Ltd*, above n 1, at [6] and [30].
4 At [19] and [25].

> supervision and direction of Mr Oertel or Mr Stevenson of the respondent. The Judge regarded these factors, particularly the last of them, as pointing towards an employment relationship, though not strongly, having regard to the particular circumstances.[5]

[9] Mr D'Arcy-Smith focused his application on the findings of fact Judge Inglis made in relation to the invoices Mr D'Arcy-Smith had submitted to the respondent for his work. These invoices were in the name of a company called Conservation Property Ltd and gave a GST number. The Judge recorded that both Conservation Property Ltd and the GST number were fictitious.

[10] The Judge stated:

> [36] Mr D'Arcy-Smith said that he was not registered for GST, that no GST was claimed on the invoices supplied to [the respondent] and that he has not deducted expenses for tax purposes. He also said that the invoices that were issued were not tax invoices. However it is difficult to reconcile this evidence with the reference to "tax/GST" that appears at the top of each of the invoices presented for payment by him.

[11] Mr D'Arcy-Smith submitted to us that there is a factual error in that paragraph: at the top of his invoices there was only the word "invoice". He submitted they were not GST or tax invoices. He added that he had not claimed any refund of GST, nor any expenses and that there was no evidence that he was in business on his own account. Those are all points that the Judge noted at the start of her judgment, so they are not points the Judge overlooked.

[12] Likewise, Mr D'Arcy-Smith is not correct in submitting that the Employment Court overlooked his evidence that he had used the invoices he submitted to keep track of the hours he had worked for the respondent. The judgment includes the following:[6]

> … When asked why he would need to issue an invoice if he was an employee, he responded by saying that it kept track of his time, because his hours were stated on the invoice. I found his evidence strained. The way in which payment was organised points away from an employment relationship.

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5 At [43]–[50].
6 At [41].

[13] Mr D'Arcy-Smith sought to meet the s 214 threshold by submitting that errors of fact can amount to an error of law. He submitted:[7]

> Lord Steyn of the Privy Council in *Edwards v Bairstow*, which is ironically an employment case, said in delivering the Privy Council's advice, is quoted as the following:
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> > A clearly erroneous factual finding may disclose an error of law warranting interference and a material misunderstanding of the evidence may amount to an error of law.

[14] In fact, the passage Mr D'Arcy-Smith quotes is from the judgment of Lord Steyn in *Stefan v The General Medical Council*.[8] But we certainly accept that factual findings can be so erroneous as to constitute an error of law. That has been the position at least since the judgments of the House of Lords in *Edwards (Inspector of Taxes) v Bairstow*.[9] For example, Viscount Simonds stated:[10]

> The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand.

Lord Radcliffe made similar comments, which are often cited.[11]

[15] However, the finding of Judge Inglis that Mr D'Arcy-Smith was an independent contractor to, and not an employee of, the respondent is far from unsupported by the evidence. Mr D'Arcy-Smith has pointed to one factual error in [36] of the judgment.[12] We see that error as of little significance, because the Judge was correct in stating that the invoice gave a fictitious GST or tax number, and she records Mr D'Arcy-Smith's evidence that he was not registered for GST and did not claim any in respect of the invoices he submitted to the respondent.

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7 In the course of the oral hearing at 3.13.32 pm.

8 *Stefan v The General Medical Council (No 3)* [2002] UKPC 10 at [6].

9 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL). Mr D'Arcy-Smith said that *Edwards v Bairstow* "is ironically an employment case". It is not: it is a tax case, in which the issue was whether the transaction was an adventure in the nature of trade for income tax purposes.

10 At 29.

11 At 36.

12 See [10]–[11].

[16] Mr D'Arcy-Smith's proposed appeal essentially challenges factual findings. He fails, and by a wide margin, to meet the s 214 threshold. That threshold has the aim of leaving factual findings related to employment relationships, actual or claimed, to the Employment Authority and the Employment Court, while reserving to this Court the role of correcting errors of law where the matter, because of its general or public importance or for any other reason, warrants the attention of this Court.

[17] In the result, the application for leave to appeal is dismissed.

[18] Mr D'Arcy-Smith is to pay the respondent costs as for a standard application for leave to appeal on a band A basis with usual disbursements.