

## **Employment status – who has it and why does it matter?**

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There are an estimated 2.3 million workers in New Zealand.<sup>1</sup> Some are paid, some are not; some work for others, some work for themselves. You might fall within one or more of these categories. Why does it matter?

Worker status opens and closes various doors to a range of entitlements and liabilities. Employees are able to access the umbrella protection of various statutes, such as the Minimum Wage Act, the Holidays Act, the Wages Protection Act, the Parental Leave and Employment Protection Act and the Employment Relations Act. The statutory entitlements conferred by these Acts create a floor beneath which an employer cannot go – or chooses to go at their peril.

You can pursue a personal grievance against your employer, sue for breach of entitlements, ask the Labour Inspector to intervene on your behalf and you can access the employment institutions – the Mediation Service, the Employment Relations Authority and the Employment Court. If you are an independent contractor, you can do none of these things – those doors are firmly locked and you cannot open them. Your working hours and conditions are not regulated by statute – they are regulated by whatever contractual terms you have managed to negotiate with those who you contract with.

None of this presents much of a problem if you are a devout follower of free market philosophies and regard the contract as King and/or Queen. It may well not be a problem if you are an individual who is blessed with a toolbelt full of talents that are in hot demand, are a skilled negotiator, and have business acumen and ready access to legal advice and assistance. It may be a problem if you speak English as a second language, have little or no knowledge of legal relationships, are naïve, are in straitened financial circumstances and have little if any real bargaining power. Or, to put it another way, if you are a vulnerable worker.

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<sup>1</sup> Statistics New Zealand “New Zealand business demography statistics: At February 2019” (25 October 2019) <[www.stats.govt.nz/information-releases/new-zealand-business-demography-statistics-at-february-2019](http://www.stats.govt.nz/information-releases/new-zealand-business-demography-statistics-at-february-2019)>.

It is not always easy to work out which side of the dividing line a worker falls on (employee or independent contractor), or the weight which ought to be given to particular factors which feed into the analysis. And it is not unknown for individuals to have little idea of what their status is. The recent case of *Leota v Parcel Express Ltd*<sup>2</sup> attracted much publicity and was said by Professor Gordon Anderson to be a welcome development in the law.<sup>3</sup> It involved a courier driver and a national company which engaged its drivers on what it described as an independent contractor basis.

The case presents a useful opportunity to reflect on the key issues – would you decide it differently, particularly if some of the factors were varied and, if so, why?

### **What were the facts?**

Mr Leota worked for a courier company as a courier driver. Mr Leota is Samoan and speaks English as a second language. He lacked an understanding of employment law and did not have a grasp of the intricacies of the agreement the company had drafted, which it asked him to sign and which he did sign. The agreement provided, under the eye-catching heading “Relationship”, an acknowledgment that the relationship was one of independent contracting and not agent or employee.

Prior to starting work with the company, Mr Leota was required to purchase a van. The company stipulated that it was to be a particular size and configuration and was to be bright red. It was also to have the Parcel Express logo printed on its side in a specific font size and design. The company had pre-planned runs to which it assigned its drivers. Mr Leota was given the Panmure run. He had no say in the size of the run or the customers who he picked up deliveries from, and dropped them off, to. He was required to perform his work to the standard specified by the company and he had no control over the days or hours he worked. He could not have more than 20 days’ holiday per year unless the company gave its approval and, when he did have time off, he had to organise a relief driver who the company could decline or accept. Mr Leota had very little time to engage in client relationship activities and,

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<sup>2</sup> *Leota v Parcel Express Ltd* [2020] NZEmpC 61.

<sup>3</sup> Gordon Anderson “Legal Update: Courier drivers – contractors or employees? *Leota v Parcel Express Ltd* [2020] NZEmpC 61” (May 2020) Centre for Labour, Employment and Work <[www.wgtn.ac.nz/\\_\\_data/assets/pdf\\_file/0006/1857624/Legal-Update-CLEWd-IN-May2020.pdf](http://www.wgtn.ac.nz/__data/assets/pdf_file/0006/1857624/Legal-Update-CLEWd-IN-May2020.pdf)> at 4.

in any event, the company had its own sales manager whose role was to deliver new business opportunities.

## **The framework for analysis**

How does all of this fit with the pivotal section in the Employment Relations Act, namely s 6? Section 6 provides:

### **6 Meaning of employee**

- (1) In this Act, unless the context otherwise requires, employee—
  - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
  - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
  - ...

As will be immediately apparent, s 6 does not set out a tick box approach to the status question. The point is that mechanical application of well-established factors will not suffice – the focus must be on an analysis of the particular relationship, between the particular parties, in the particular circumstances, at the particular point in time the issue arises for consideration. Ultimately the issue is on which side of the dividing line (employee v independent contractor) a worker falls. In a nutshell:

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

While s 6 is light on detail, it does not lack convenient pointers or built-in flexibility to adapt to changing work practices and the way in which working relationships are viewed over time.

Inherent vulnerability is, of course, not enough to get a worker home on a status argument. The Court is required to apply the analytical framework of s 6, supported by the case law, rather than asserting any preferences it might have for the model of contracting, or being guided by sympathy for the position of one or other of the parties (the received wisdom being that hard cases make bad law). But, in applying s 6, it is of pivotal importance to select the right starting point.

The right starting point is not the terms of the contract; it is (as s 6 itself makes clear) the real nature of the relationship. This is liable to cause a degree of discomfort for those who prefer a strict approach to contract law: offer + acceptance + consideration = contract. But employment agreements are relational contracts, hence the title to the Act. They are not purely economic transactions and should not be viewed in that way.

So how does one go about determining the real nature of the relationship? Clearly you have to look beyond the surface (the way in which the relationship is characterised) to what is happening in practice. All of this is consistent with the underlying objectives of the Act, including a recognition of the inherent inequality of bargaining power between employers and employees (see s 3).<sup>4</sup>

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<sup>4</sup> **3 Object of this Act**

The object of this Act is—

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
  - (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
  - (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
  - (iii) by promoting collective bargaining; and
  - (iv) by protecting the integrity of individual choice; and
  - (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
  - (vi) by reducing the need for judicial intervention; and
- (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; and
- (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

A range of factors may point towards an employment relationship, such as the requirement to wear a uniform emblazoned with a company logo, but no one factor can or should be regarded as determinative.<sup>5</sup> Context is all.

And it probably goes without saying that all factors used to distinguish employment relationships from other working relationships (including the way in which the relationship is described) are susceptible to manipulation – the Court must be wise to such stratagems.<sup>6</sup>

The key factors which pointed in favour of an employment relationship in Mr Leota's case included:

- a lack of control over the hours and days worked, the way in which the work was performed, and who did it;
- a lack of ability to grow his alleged business, and accordingly his level of remuneration;
- restrictions on leave.

The key factors which pointed in favour of an independent contractor relationship in Mr Leota's case included:

- the way in which the parties had described their relationship in the contract they had signed.

Factors which the company relied on as relevant and which the Court was not particularly drawn to in Mr Leota's case included:

- the fact that Mr Leota had his own van (he had his own van because the company required him to purchase a van before they agreed to give him work (he did not own a van beforehand); he purchased the van via arrangements set up by the

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<sup>5</sup> A table of indicia was set out in *Leota*, at [38], of common questions that might be asked in considering whether a worker was an employee or independent contractor and which way the answer might point. A copy of the table is annexed to this paper.

<sup>6</sup> *Leota* at [37], citing Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, Oxford 2016) at 331.

company and deductions were made from his pay each fortnight by way of repayments; the company stipulated colour, size and signwriting);

- the fact that, some 20 years previously, the Court of Appeal had found that a courier driver was an independent contractor<sup>7</sup> (this finding was made under previous legislation);
- industry practice, which was said to be in favour of engaging courier drivers on an independent contractor basis (the Court observed that an industry-wide perception of status was of limited relevance to the inquiry – if it were otherwise, it might lead to the tail wagging the dog, reflecting nothing more than the fact that a whole industry had got it wrong, possibly for many years).

## **Outcome**

While there were factors pointing both towards and away from employee status, the weight was squarely in favour of Mr Leota being an employee of the company. Accordingly, Mr Leota was entitled to a declaration that he was an employee and had been from the outset of his time with the company.

What, you might be wondering, is the benefit of a declaration of status? A declaration of status enables an employee to use it as a springboard for further claims, including for unjustifiable dismissal, disadvantage, lost wages and holiday pay.

## **Some questions to mull over**

- Is the judgment authority for the proposition that all courier drivers in New Zealand are employees and, if not, why not?
- What role might worker vulnerability play in the assessment process? How much weight, if any, should it be given and why?

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<sup>7</sup> *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, [1993] 1 ERNZ 695 (CA).

- Would it have made a difference if Mr Leota worked for three companies at the same time and, if so, why?
- What if Mr Leota had spent each evening delivering Uber Eats in his red Parcel Express logo'd van?
- What if the Parcel Express logo was magnetic and readily removable?
- What if there had been no restriction on the amount of time off Mr Leota could have?
- What relevance, if any, would it make if the rate of pay received under the contracting model provided sufficient slack for the engagement of a relief driver when Mr Leota took leave?
- Does it make a difference if the company exercises a high degree of control over a worker to meet operational needs, regulatory requirements and/or customer demands?
- True or false: once an independent contractor, always an independent contractor?
- What are the arguments for, and against, unlocking the door and extending the current suite of employee entitlements to all workers?<sup>8</sup>

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<sup>8</sup> Ministry of Business, Innovation and Employment (MBIE) *Better Protections for Contractors: Discussion document for public feedback* (26 November 2019).

<b>Indicia</b>	<b>Employee</b>	<b>Independent Contractor</b>
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?		✓