

One of the most perplexing areas of employment law can be employment status. The reason being that section 6 Employment Relations Act 2000 says that it doesn't matter what your written contract says, it is the "*real nature of the relationship*" that is important and the nature of the relationship can only be determined on the facts of an individual case. It is an important issue because without employment status an employee cannot claim personal grievances if their employment ends unjustifiably and they are not entitled to paid leave or minimum wages. The Supreme Court has now issued its first employment law decision in *Bryson v Three Foot Six Limited* which looks at this issue in the context of the film industry. In this decision the Supreme Court has overturned the Court of Appeal's decision and restored that of the Employment Court. The Employment Court had looked at the various tests and had found that despite the widespread industry practice of engaging contractors in the film industry, Mr Bryson was an employee. The facts are as follows:

Mr Bryson was employed as a model technician for Three Foot Six, which was filming special effects for the Lord of the Rings project. He was initially employed without any form of written contract but was then given a standard "*Crew Deal Memo*". This was a standard independent contractor agreement used in the industry. The reason being that the work was often project driven based on the intermittent nature of screen productions and the transferable skills of industry practitioners, most of whom work on several projects for several different producers. But the evidence of industry practice was of a general nature and not applicable to Mr Bryson. In this case the Employment Court could not escape the fact that Mr Bryson could not be regarded as a man in business on his account. He worked for one employer, he was given training, Three Foot Six closely controlled his work, he was expected to work regular hours, was treated as an employee and was paid for downtime. He was therefore an employee.

This case turns on its own facts. Mr Bryson was closely integrated into the business and so he was regarded as an employee. It is clear from the decisions of the Employment Court and Supreme Court, that there is no intention to drastically alter the way in which the film industry structures its contractual arrangements. But, it is a

TO BE A CONTRACTOR OR NOT TO BE ...

reminder that employers should be reluctant to apply a "label" of contractor to all staff without turning their minds to the true position. The Employment Relations Act 2000 is intended to redress the imbalance between employers and employees and in this regard the Employment Relations Authority or Employment Court are likely to overturn any arrangement which looks like it limits an employee's rights under the Act.

WHAT TESTS DO THE COURTS APPLY WHEN DETERMINING IF AN INDIVIDUAL IS AN EMPLOYEE OR A CONTRACTOR?

THE CONTROL TEST

Whether or not the employer has the ability to "control" the person in his/her work is a fundamental aspect of the control test. Controlling hours of work, duties, are all aspects of an employer's control over an employee and this was held to be an important aspect in establishing whether there is an employment relationship. See *Challenge Realty Limited v Commissioner of Inland Revenue*. The Court of Appeal in that decision found that control by the employer of its employees pointed to the existence of an employment relationship.

THE INTEGRATION TEST

This test refers to whether or not the employee is in the business on their own account or whether they are "part and parcel" of the organisation for which he or she is working. See *Telecom South Limited v Post Office Union*. The type of person who for all intents and purposes is working for the one employer but is responsible for their own ACC, tools of trade. The integration test covers that type of person. In *Curlew v Harvey Norman Stores (NZ) Pty Ltd* (AC 46/02), what the employment Court described as a significant degree of integration was held to be outweighed by the economic reality that the plaintiff was in business on his own account.

Other tests include the fundamental/economic reality test and the mixed test.

FACTORS SUGGESTING PRINCIPAL/INDEPENDENT CONTRACTOR

- Contractor controls how and when job is done
- Payment is made at the end of the job, or in instalments according to progress of work
- Contractor is able to choose job and can hire people without approval
- Contractor pays tax, ACC and insurance themselves
- Contractor supplies equipment and materials
- Contractor is free to accept similar work from a number of sources.

FACTORS SUGGESTING EMPLOYER/EMPLOYEE RELATIONSHIP

- Employer has authority over how job is done
- Employer controls hours worked
- Employer makes profit/loss
- Employer deducts ACC and PAYE
- Employer supplies materials
- Employer owns or leases equipment
- Employee is bound to an employer at a time and is expected not to compete or offer skills to competitors.

From a legal perspective it is interesting to observe the Supreme Court's approach in the *Bryson* case to rights of appeal in the employment jurisdiction. The Supreme Court has made it clear that the Court of Appeal must limit its enquiries on appeal from the Employment Court to questions of law. Section 6 is concerned with a factual enquiry - determining the real nature of the relationship. The Court of Appeal is not entitled to revisit a sound decision of the Employment Court on this issue even if it disagrees with the decision - unless the Employment Court has erred in law.

For more information, contact LawWorks at the below address.