VICTORIA UNIVERSITY OF WELLINGTON
TE HERENGA WAKA

Centre for Labour, Employment and Work

Legal Update: Courier drivers - contractors or employees? *Leota v Parcel Express Ltd* [2020] NZEmpC 61.

Gordon Anderson, Professor of Law, Victoria University of Wellington.

Introduction

Leota v Parcel Express Ltd raises the contentious issue of whether owner drivers, and in particular courier drivers, are employees or independent contractors. The questionable conditions of work for courier drivers has received considerable publicity in the last few years[1] and a determination on their employment status is, therefore, of considerable interest. While the determination in this case applies to only a single driver the Court's reasoning in the case potentially has a much wider application. While there are some features of the case that may not be generally applicable, it is difficult to see why the overall tenor of the decision would not apply more widely to the industry and have the effect of reinterpreting the position as understood following *TNT Worldwide Express (New Zealand) Ltd v Cunningham.*[2] Such a reinterpretation would not be unexpected following the changed statutory foundation for determining whether a worker is an employee as well as case law developments in both New Zealand and Britain. In 2017, in *Prasad v LSG Sky Chefs*, a full Employment Court stated:

> [18] We are not drawn to this [strict contractual offer, acceptance, consideration analysis] aspect of the defendant's argument. It seems to us that it has been overtaken by developments in the law, specifically in the employment sphere in New Zealand and in contract law more generally. In this regard the strict contractual approach favoured under the previous Employment Contracts Act 1991 was displaced 17 years ago by the enactment of the [Employment Relations] Act. That Act, as the name suggests, heralded in a new way of looking at contractual relationships in the workplace. It has more generally been acknowledged that a rigid offer/acceptance/consideration approach in contract law can give rise to difficulties

[1] See for example:

https://www.rnz.co.nz/national/programmes/checkpoint/audio/2018655369/independent-courier-drivers-could-take-class-legal-action ; https://www.stuff.co.nz/business/better-business/104705738/long-days-no-annual-leave-no-breaks--courier-drivers-reveal-difficulties-of-job

[2] *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, [1993] 1 ERNZ 695 (CA).

The approach of the Employment Court in *LSG Sky Chefs* was endorsed by the Court of Appeal when it refused leave to appeal, stating that '*it would have been surprising had the Court reached any other conclusion than the one that did*'.[3]

The now accepted approach to determining whether a worker is an employee was restated in *Leota* when the Chief Judge reiterated that any analysis of a working relationship must begin with section 6 of the Employment Relations Act, '*not the common law relating to contract formation.*'[4] The essence of s 6 is that the Authority or court must determine '*the real nature of the relationship*' between the parties and that a statement describing the relationship is not to be regarded as determinative.

In *Leota* the Chief Judge referred to a comment by Prof Mark Freedland that all the common law factors for distinguishing employment from other work arrangements are susceptible to manipulation and that the courts must be wise to such stratagems.[5] Indeed, decisions in recent years make it clear that the courts in both Britain and New Zealand are fully aware of such stratagems and are prepared to look behind them to ascertain the true nature of the relationship between the parties. This approach is particularly clear in the Court's analysis of the facts in *Leota*.

This approach to analysing working relationships was made explicit in *LSG Sky Chefs* when the Court, in an expansionary approach, held that the real nature of a triangular employment relationship was that the workers concerned were not in fact contractors to, or employees of, the labour hire company but employees of LSG Sky Chefs which, in reality, controlled both the work and the workers. However, while the courts may have adopted a more expansive approach in determining whether a worker is an employee *Leota* is the first since *TNT Worldwide Express Ltd* to consider in any depth the contentious issue of whether courier drivers are contractors or employees.

Facts and analysis

The facts of *Leota* are relatively straightforward although one point that may be of significance for future cases, and which was also a factor in LSG Sky Chefs, was that Mr Leota, for whom English was a second language, had a limited understanding of his legal status and of the complexities of the business arrangement that he was entering into. Among other things, he was held not to have appreciated that independent contracting was a normal practice in the industry. It is, however, uncertain whether this factor would necessarily have affected the outcome of the case. The Court specifically made the point that industry practice must be approached with caution as '*it may lead to the tail wagging the dog*'[6] and that the fact that an industry considers that its workers are engaged as independent contractors might simply reflect a misunderstanding of their actual legal status. Moreover, while Mr Leota may not have appreciated the full consequences of the arrangement he entered into, the terms and conditions of his employment seem to have been common in the industry.

[3] *LSG Sky Chefs NZ Ltd v Prasad* [2018] NZCA 256 at 25.

[4] *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [31].

[5] Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, Oxford, 2016) at 331.

[6] *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [54].

In her decision Chief Judge Inglis succinctly stated that the key issue to be determined was '*whether the worker serves their own business or someone else's business*'.[7] the Chief Judge's conclusion was that Mr Leota was serving the business interests of Parcel Express and that he had little or no ability to serve his own personal business interests.

A key factor in *TNT Worldwide Express Ltd* was the Court of Appeal's rejection of arguments that the application of the control test suggested employee status. In *Leota*, the Chief Judge acknowledged the point made in *TNT Worldwide Express Ltd* that control may be a neutral factor as the effective management of a joint business enterprise may involve two independent parties accepting that one may need to exercise considerable control for the mutual commercial benefit of both. The Court accepted that Parcel Express legitimately wished to exert a high degree of control in relation to Mr Leota's work for operational purposes and to meet its customers' demands but added '*the fact that a putative employer wishes to exert control over a worker in order to meet its own business needs cannot of itself neutralise the impact of control in the assessment process.'*[8] On the facts, the Court held that the level of control went well beyond that to be expected for business purposes – '*it remained unexplained why it would enhance Mr Leota's business opportunities to be required* 'without limitation*', to observe and comply with the directions and requests of Mr Cole or any other manager or officer of the company …. To have his mileage audited by the company (without his knowledge); and to be restricted in terms of the amount of leave he could take.'*[9] The Court took the view that Mr Leota did not exercise any real autonomy and indeed noted that his contract was terminated when he objected to instructions to pick up tyres as a favour for a company because the work was unpaid.

The Court also appeared to regard Parcel Express's arguments that Mr Leota was free to grow his business with some cynicism. The point was made that the only opportunity to do so would be by attracting new customers but that doing so was unlikely to benefit Mr Leota. Mr Leota was required to inform the company of any such new business and it was clear from the terms of his employment that such customers became customers of the business, not Mr Leota. Indeed, the restraint of trade clause in his contract would have prevented Mr Leota having any future relationship with such customers. The Court reached the fairly obvious conclusion that '*in reality what Parcel Express was asking Mr Leota to do was to assist it to build its own business.'*[10] Similarly, the Court rejected an argument by Parcel Express that Mr Leota could grow his business by delivering Uber eats in the evening work as "*ridiculous*". Not only would he have required Parcel Express's consent to do so, it is also likely that this would have led to him exceeding the maximum number of permitted driving hours.

While courier drivers are subject to many of the same constraints and controls as employees the one significant difference in their situation is that they are expected to make a capital investment through the purchase of a dedicated vehicle, a level of investment that would be unusual for any other group of employees. In this case the purchase of a van to Parcel Express's specifications was facilitated by the company, ownership was retained by the seller, payments were deducted from the pay Mr Leota

[7] At [38].

[8] At [45]

[9] At [48].

[10] At [61] (italics in original).

received from Parcel Express, and he could not sell the van without the permission of Parcel Express. The Court distinguished these facts from those in *TNT Worldwide Express (NZ) Ltd* and held that Mr Leota's interest in the van was, at best, a neutral factor.

Conclusion

One might have hoped that the combination of the statutory test in s 6(2) of the Employment Relations Act and the decisions in the *Bryson* litigation would have settled the boundaries between the two categories of workers. Such hopes have proved illusory. The temptation to categorise workers as contractors to avoid the statutory protections available to employees or to shift economic risk from the employer to the worker is one that proves difficult for many companies to resist. MBIE's release, in November 2019, of its discussion document "Better Protections for Contractors", and its call for submissions on achieving this, illustrates the awareness of the continuing and widespread potential for the exploitation of contractor arrangements.

Leota may well be appealed but, if the case is not overturned, it is likely to establish a strong basis for the re-examination of the legal status of courier drivers and owner-drivers generally. Should this result in courier drivers becoming entitled to the same protections as employees it is to be welcomed.