

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 235
EMPC 359/2023**

IN THE MATTER OF a declaration under s 6(5) of the
Employment Relations Act 2000

AND IN THE MATTER OF an application for a stay of proceedings

BETWEEN POSTAL WORKERS UNION OF
AOTEAROA INCORPORATED
Plaintiff

AND NEW ZEALAND POST LIMITED
Defendant

Hearing: 21 November 2024
(Heard at Christchurch via Audio Visual Link)

Appearances: S Mitchell KC and A Drumm, counsel for plaintiff
H Kynaston, H Tevita and G Menzies, counsel for defendant

Judgment: 29 November 2024

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for a stay of proceedings)**

[1] The plaintiff seeks a declaration that the true nature of the relationship between two of its members and the defendant is employment. The defendant disagrees. It is common ground that the litigation engages s 6(2) of the Employment Relations Act 2000 (the Act), because the Court is required to determine the real nature of the relationship.

[2] The proceeding is at an advanced stage. All interlocutory steps have been concluded and the hearing is set down for five days beginning on 24 February 2025. In fact, it was originally scheduled to be heard in July 2024.

[3] The defendant has now applied for a stay pending the Supreme Court possibly granting leave to appeal the Court of Appeal's judgment in *Rasier Operations BV v E Tū Inc*.¹

[4] The defendant says a stay should be granted because:

- (a) the *Rasier* decision made several findings relevant to this case that may be subject to examination by the Supreme Court;
- (b) the leading authority on the determination of employment status, the Supreme Court's decision in *Bryson v Three Foot Six Ltd*, is nearly 20 years old.² There have been significant changes in the labour market and the nature of work and employment relationships since;
- (c) a number of issues addressed in *Rasier* were not addressed in *Bryson*;
- (d) there is significant public interest in the *Rasier* decision and the issue of employment status more generally;
- (e) in the circumstances, there is a reasonable prospect that leave to appeal will be granted;
- (f) should leave be granted, the Supreme Court's decision on the appeal will be a key consideration in the determination of employment status;
- (g) even if leave is not granted, the Supreme Court may make observations in its decision that will be relevant to this proceeding;

¹ *Rasier Operations BV v E Tū Inc* [2024] NZCA 403.

² *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

- (h) the outcome of the parties' dispute has the potential to affect the defendant's business model for the delivery of parcels and mail in provincial and rural areas;
- (i) the outcome has the potential to affect the defendant's contractual relationships with many of its contractors;
- (j) the present proceedings are not urgent; and
- (k) the balance of convenience and interests of justice favour granting the stay.

[5] The plaintiff is opposed to a stay being granted. It takes the view that the tests assisting the assessment required by s 6, as explained in *Bryson*, are not being revisited in any material way by the application to the Supreme Court in *Rasier*. Rather, the plaintiff says, the *Rasier* leave application essentially accepts the tests referred to in *Bryson* but claims the Court of Appeal did not apply them properly.

***Rasier* raised before**

[6] This is not the first time the potential impacts of *Rasier* have been raised. The case was raised by the Court with counsel at a conference on 20 February 2024, about a month before the Court of Appeal heard submissions. At that time counsel considered the Court of Appeal's decision would be unlikely to have a significant bearing on this proceeding to justify delaying a hearing.

[7] This subject was revisited at a conference on 27 May 2024. Counsel maintained their view that there were sufficient differences between the two sets of proceedings that this case should proceed.

The power to grant a stay

[8] Counsel accepted that the Court has the power grant a stay. That jurisdiction is derived from the equity and good conscience jurisdiction in s 189 of the Act and from reg 6(2)(b) of the Employment Court Regulations 2000.

[9] The power is discretionary. In exercising that discretion, I consider that what must be taken into account is whether it would be in the interests of justice to stay the proceeding. That is a broad assessment but must include the reasons for applying for a stay, its proposed duration, the interests of the parties and the efficient use of scarce judicial resources.

Defendant's submissions

[10] Mr Kynaston's submissions supporting the application began by analysing the *Rasier* decision, addressing what was said to be matters dealt with by the Court of Appeal in that case that had not been considered in *Bryson*.

[11] In summary, the issues arising from *Rasier* identified as likely to engage the Supreme Court's interest were:

- (a) The weight to be given to the labels used by the parties in describing their relationship.
- (b) The relevance of the capability and understanding of the parties.
- (c) The question asked by the Employment Court: who is working in whose interest? The Court of Appeal found that this question did not assist in distinguishing employees and contractors.
- (d) The relevance of the objects of the Act in the analysis required by s 6.
- (e) The Court of Appeal describing reasons for exercising control as irrelevant to the control test.
- (f) The relevance of the provision of equipment by the worker whose status is to be determined.
- (g) The role or weight of integration as an indicator of employment status.

- (h) That some comments in *Rasier* may have the effect of going beyond the immediate parties, contradicting the emphasis required in the Act on protecting the integrity of individual choice.
- (i) The flexibility of working arrangements identified in *Rasier* did not feature in *Bryson*.
- (j) The Court of Appeal's observations about an individual's potential involvement in other business interests which was not considered in *Bryson*.

[12] All of those points were said to indicate, in varying degrees, that any Supreme Court decision will have an impact on this case. Mr Kynaston likened the working arrangements between the defendant and the two plaintiff's members on whose behalf the proceeding has been lodged, as having some features of the platform or gig-economy reflected in *Rasier*.

[13] It was said that the outcome of the application for leave (and if leave is granted the Supreme Court's subsequent judgment) will have significant public interest, especially since the business environment has changed in the 20 years or so since *Bryson* was decided. Mr Kynaston was keen to emphasise that this litigation is extremely important to the defendant given its present business model and, as I understand it, other changes that might be proposed in future. The defendant is therefore placing considerable store in the outcome of this case. It considers this case would be greatly assisted by waiting for a decision from the Supreme Court.

[14] Part of this argument was that there is no urgency attaching to this litigation. One of the union's members no longer works for the defendant and, in relation to him, this litigation is effectively a monetary claim. In relation to the other union member, the lack of urgency was said to be reflected in the fact that she continues to work for the defendant.

[15] The defendant proposed that the stay should be conditional on being reviewed once the Supreme Court's decision on the leave application is available.

Plaintiff's submissions

[16] Mr Mitchell's submissions in reply can be summarised as follows:

- (a) The correct approach to applying s 6 is settled.
- (b) *Rasier* applied the test in *Bryson*.
- (c) The defendant has not supported its application for a stay with authority that might assist exercising the discretion in its favour in this case.

[17] The differences in the nature of the facts between *Rasier* and the parties in this case was a cornerstone of the plaintiff's opposition to a stay. Mr Mitchell made the point that in *Rasier* neither party suggested *Bryson* was wrongly decided. Instead, the dispute related to issues not addressed in *Bryson* but that arose on the facts in *Rasier*. In *Rasier*, the parties disagreed about the existence of any contract between the Uber companies and the four driver plaintiffs. The application of s 6 and the tests to assist it were said to be simpler in this case where the parties agree that there is or was a contractual relationship. They disagree about what that relationship is or was.

[18] Underlying these submissions was that, if the Supreme Court grants the application for leave, it will be applying existing law as described in *Bryson*.

[19] Turning to the grounds relied on for the stay Mr Mitchell said:

- (a) Attributing comments about contractual intention in *Rasier* was a misapplication of the decision.
- (b) As to the "who was working in whose interest" formulation, which Mr Mitchell accepted was not considered in *Bryson*, it was said that the approach in the Employment Court did not capture the fundamental test to which the question was intended to be directed. On this analysis, the Court of Appeal in *Rasier* correctly applied the fundamental test so the issue would not be decisive.

- (c) The defendant's submission about the application of the object in s 3 of the Act was resisted on the basis that, had it been of assistance, the matter would have been considered in *Bryson*.

[20] Similar points were made in response to the defendant's reference to the use of equipment, criticisms of the Court of Appeal's approach to the reasons for control being irrelevant, and the potential effect on third parties.

[21] Mr Mitchell accepted that *Rasier* raises matters of significant public interest but maintained that case is not comparable to this case.

Analysis

[22] I am not persuaded that it is appropriate to grant a stay.

[23] There are several unattractive difficulties with granting a stay on the basis put forward by the defendant. The first of them is the element of speculation involved in the application about leave being granted and, if it is, on what grounds.

[24] The second difficulty confronting the defendant is that the preponderance of the leave application in *Rasier* is directed in the way Mr Mitchell submitted, about whether the Court of Appeal properly applied *Bryson*. The application does not, for example, invite the Supreme Court to overturn *Bryson*. It needs to be borne in mind that the analysis in s 6 is largely a factual inquiry. In that context, any differences between the *Rasier* case and this one are more about the respective industries in which they work. There is also a significant difference between this case and *Rasier* in that the plaintiff and defendant agree there was a contractual relationship. That is not the situation in *Rasier*.

[25] The unattractiveness of granting a stay is compounded by considering the parties respective positions. The defendant sees little downside in a stay but the plaintiff union and its two members could face a lengthy delay. That delay, and its impact, is not lessened because the plaintiff does not claim that the case is urgent. I prefer to see the issue as being that, in the absence of a compelling reason, the parties are entitled to expect a scheduled hearing to proceed. That is, in my view, consistent

with both the interests of justice and ensuring the efficient use of scarce judicial resources.

Outcome

[26] The application for a stay is unsuccessful and it is dismissed.

[27] Costs are reserved.

K G Smith
Judge

Judgment signed at 4.50 pm on 29 November 2024