IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2025] NZEmpC 19
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:	4 February 2025 (Heard at Christchurch via Audio Visual Link)
Appearances:	S Mitchell KC and A Drumm, counsel for plaintiff P Wicks KC, H Kynaston, H Tevita and G Menzies, counsel for defendant
Judgment:	14 February 2025

INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH
(Second application for a stay of proceedings)

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[1] This is the second application by New Zealand Post Ltd for a stay of this proceeding and to vacate the hearing scheduled to begin on 24 February 2025.

[2] NZ Post's first application was made when an application to the Supreme Court for leave to appeal in an unrelated judgment, *Rasier Operations BV v E Tū Inc*, was pending.[1]

[3] NZ Post's second application was filed on 14 January 2025 and followed the Supreme Court granting leave to appeal in the *Rasier* case.[2] The first application was declined partially because it was not yet clear whether the Supreme Court would grant leave and, if it did, on what grounds.[3] NZ Post said the subsequent granting of leave removed speculation about what might be before the Supreme Court. Additionally, the application stated that the ambit of the *Rasier* appeal is such that the "applicable law" is uncertain and a stay is warranted.

The claim

[4] Before considering the submissions, it is necessary to provide some context by briefly describing the claim by Postal Workers Union of Aotearoa Inc. The union issued proceedings against NZ Post on behalf of two of its members, Pamela Moat and Michael Wood. It claimed that while Ms Moat's and Mr Wood's contracts with NZ Post purport to create an independent contractor relationship, the real nature of each relationship is employee/employer. The union seeks a declaration to that effect. It also seeks costs.

[5] NZ Post does not accept the union's claim. It has pleaded that both Ms Moat and Mr Wood operated their own businesses within the network it established and did so for their own benefit and for the benefit of NZ Post.

[6] It is common ground that the litigation engages s 6 of the Employment Relations Act 2000 (the Act). Section 6(1) defines the meaning of "employee" as:

> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; …

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1 *Rasier Operations BV v E Tū Inc* [2024] NZCA 403; and *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2024] NZEmpC 235.
2 *Rasier Operations BV v E Tū Inc* [2024] NZSC 177.
3 *Postal Workers Union of Aotearoa Inc,* above n 1, at [23].

[7] Section 6(2) reads:

> 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.

[8] Where the Court must determine the real nature of the relationship s 6(3) provides:

> 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.

The second application

[9] The second application contained 12 grounds. The first two grounds set out the framework for the remaining grounds by referring to the Supreme Court's approved question in *Rasier* and its invitation to the parties in that appeal to make submissions on the nature of work. The approved question was: "whether the four Uber drivers are employees in terms of s 6 of the Employment Relations Act 2000".

[10] Building on those first two grounds the application, in summary, relied on:

(a) A statement that it is apparent from the leave question that the Supreme Court intends to revisit its decision in *Bryson v Three Foot Six Ltd*.[4]

(b) The Supreme Court's decision could see a refinement or enlargement of the tests in *Bryson* or a change in the law altogether. The law is currently uncertain.

(c) Even if the current tests are maintained, the Supreme Court will provide guidance on how they are to be applied, 20 years on from *Bryson*. That guidance will be significant and binding in s 6 cases including the

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

present one which turns entirely on the application of the law to the particular circumstances of the case.

(d) The weight to be given to the intention of the parties is unclear. The Court of Appeal in *Rasier* did not address the relevance of an individual's vulnerability or capability and the extent to which they made an informed and free choice to enter into a contract of service. This ground pleaded that the subject was not dealt with in *Bryson*.

(e) There is significant public interest in the *Rasier* decision and the issue of employment status generally.

(f) The outcome of this proceeding has the potential to affect NZ Post's entire business model for the delivery of parcels and for the delivery of mail in provincial and rural areas. It is of considerable significance to NZ Post's business.

(g) The outcome has the potential to affect "numerous third parties" through the impact it has indirectly on the contractual relationships NZ Post has with its contractors.

(h) The present proceeding is not urgent.

(i) Neither party should be put to the time, cost and personal stress of preparing for and attending a hearing until the Supreme Court issues its decision and the law is certain.

(j) The balance of convenience and interests of justice favour granting a stay.

[11] NZ Post supported its application with an affidavit from Malcolm Shaw, its Chief Governance and Sustainability Officer, referring to its nationwide business model for the delivery of parcels. Mr Shaw expressed his view that the scope of the appeal in *Rasier* is such that the law is uncertain and that there will be prejudice to the

company if the hearing proceeds. He made a further comment that clarification and certainty of the law is important for NZ Post because of its business model and the potential effect on about 1,500 contractors. A comparison was drawn between that difficulty and the one he considers faces the union and its members on whose behalf the proceeding was brought. He commented that the proceeding was not brought urgently and that Ms Moat and Mr Wood are in paid work, noting that Mr Wood obtained employment after ending his time with NZ Post and that Ms Moat continues to be engaged by the company.

The opposition

[12] The application is opposed. The union's position is that there has already been a decision declining a stay and the Supreme Court granting leave does not provide a sufficient change in circumstances for the subject to be revisited. The union's notice of opposition stated that, while the Supreme Court invited submissions on the approaches of the Employment Court and Court of Appeal, there is "likely to be no material difference" in any outcome. The union's opposition included that the status of these relationships is important to the parties and a large number of employees who will be impacted by changes in the operation of NZ Post's business model. A further delay would create what the union referred to as a serious injustice for it, its members and others.

[13] Michael Hunter swore an affidavit in support of the union's position. He is the secretary of the Northern District of the union. Mr Hunter's evidence was that the outcome of the proceeding could impact on a large number of NZ Post's contractors and that there is a broader interest in the proceeding. He referred to a collective agreement between the union and company covering approximately 400 members employed as delivery agents. He also referred to the impact of consultation in relation to NZ Post's proposal that the mail network be closed, with mail being delivered by couriers, which would lead to the prospect of redundancies. He referred to the union challenging aspects of this recent decision-making in the Employment Relations Authority and to the frustration he says has emerged amongst contractors and employees over the timeframe for these proceedings being determined.

NZ Post's Submissions

[14] Mr Wicks KC acknowledged that this is the second application by NZ Post but submitted that the Supreme Court's decision to grant leave, in December 2024, removed the element of speculation that formed part of the reasoning to decline the first application.[5] He submitted that the applicable law is presently uncertain and that a review of the relevant law can be expected. His submission was that the question formulated by the Supreme Court was framed more broadly than the one considered by the Court of Appeal. From the scope of the Supreme Court's leave judgment, he anticipated a policy "rewrite" of the test to apply when considering s 6 of the Act. He considered that there is a strong likelihood the Supreme Court will revisit the s 6 test in terms of both its "elements and their application".

[15] Mr Wicks supplemented the application's claim that the law is uncertain by arguing that, if the law about the approach to s 6 was settled, the Supreme Court's approved question would have asked whether the Court of Appeal in *Rasier* erred in its application of it. Instead, the approved question indicated that a rehearing, addressing the legal and factual reasoning of both the Court of Appeal and this Court in the earlier iterations of the *Rasier* case, is likely.

[16] The submissions referred to the prospect that the Supreme Court might determine the *Bryson* tests no longer work in today's society. Mr Wicks accepted that the Supreme Court's decision could confirm, modify or reverse the Court of Appeal's decision in *Rasier* or might result in no change at all. Nevertheless, he submitted that this proceeding draws heavily on *Bryson* in both its anticipated evidence and expected submissions and it would be unsatisfactory to continue with this litigation until after the Supreme Court has released its judgment. Waiting for the Supreme Court decision was said to be a preferrable course, especially if that would avoid relitigating the issues now before this Court in the future. It was said that, even if the tests in *Bryson* are maintained, further guidance about them might be available given the passage of time since that case was decided.

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5 *Postal Workers Union of Aotearoa Inc*, above n 1, at [23].

[17] Mr Wicks drew a link between matters to be raised in the *Rasier* appeal and in this case. He emphasised the approach to be taken to the intention of the contracting parties when considering s 6 which may be a feature of this case. He said the approach to intention, including the weight to be given to it, is not clear or settled. He contended that the subject was not considered in *Bryson* and that there are other cases since that judgment where this Court gave significant weight to the stated intentions of the parties because of their understanding, capability and bargaining power.[6] In comparison it was said that, in the Court of Appeal's *Rasier* decision, the approach to be taken to the intention of the parties was dealt with in different ways and, in particular, the weight to be given to labels used by the parties was inconsistently dealt with.

[18] Other issues said to link this litigation with issues in the *Rasier* appeal were:

(a) The relevance of the inquiry into "who was working in whose interests", which was referred to in this Court in the first instance *Rasier* decision.[7]

(b) The relevance of the objects of the Act.

(c) The relevance of the reasons for particular controls placed on a contracting party, which the Court of Appeal in *Rasier* held to be irrelevant.

(d) The extent to which the purchase of certain items of equipment ought to be taken into account.

(e) The approach to be taken when a contractor's work is integral to the principal's business and where the contractor is integrated into the business whilst performing the services but not otherwise.

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6 *Brunton v Garden City Helicopters Ltd* [2011] NZEmpC 29, [2011] ERNZ 504 at [84]; and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [30].

7 *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192.

(f) The extent to which the Court's decision in relation to one or more individuals might apply to other individuals engaged on the same standard terms.

(g) The extent to which a person's ability to choose when they work might influence a determination of status.

[19] The submissions emphasised that many of those issues were not considered in *Bryson* but that they may arise in both this proceeding and the *Rasier* appeal. There was, therefore, a real risk of unfairness and significant prejudice to the defendant, and possibly also to the plaintiff, if a stay was not granted. Mr Wicks rounded out these submissions by saying it was in the interests of justice, and the balance of convenience, favoured granting the stay.

[20] As to the duration of the stay, Mr Wicks advised the Court that the Supreme Court has set down the *Rasier* appeal for a two-day hearing on 8 and 9 July 2025. He accepted that, if a stay is granted, a hearing in this case would not occur until 2026. However, he submitted granting a stay is appropriate because doing so might avoid the need for subsequent re-litigation of the issues in this case if there is a change in the law.

Postal Union's Submissions

[21] Mr Mitchell KC began his submissions by commenting that the thrust of NZ Post's case did not recognise that, when the Supreme Court grants leave it expects submissions to address law and policy. He drew a distinction between that Court inviting submissions about the test or tests to apply in a s 6 case and deciding to revise them. The company's submissions were described as ambitious and reading more into the granting of leave than is reasonable.

[22] Mr Mitchell's next submission was that the argument that this application for a stay has lost its speculative quality is misplaced. It remains speculative, he submitted, until the Supreme Court's judgment in *Rasier* is released. The submissions

supporting the application included what he referred to as many assumptions about what the Supreme Court will do.

[23] Developing these submissions, Mr Mitchell did not accept that there is such a similarity between *Rasier* and this case that it could be said to be appropriate to wait for the outcome of the Supreme Court appeal. He emphasised that s 6 requires this Court to consider the real nature of the relationship which is a factual inquiry where, since *Bryson*, the starting point has been the contract between the parties. He considered that contract to be the real departure point between this proceeding and the dispute in *Rasier*. In this case, the plaintiff and defendant accept that there is a contractual relationship between them, and the evidence is that the contractual terms are complied with. That means this case focuses on an analysis of the contract and whether the obligations that were created show that Ms Moat and Mr Wood are employees not contractors. In contrast, in *Rasier* the appellant companies maintain that there is no contractual relationship between them and the four drivers. Mr Mitchell's submission, put colloquially, was the *Rasier* litigation is about the gig-economy and this case is not.

[24] Mr Mitchell did not see the same significance attaching to the future debate about the intention of the parties as Mr Wicks did. The difference Mr Mitchell drew on was that this case was not one where the parties negotiated the agreement but it was presented on a "take-it or leave-it" basis. The union therefore sees that, while the intention of the parties is important, it is the overall assessment of the nature of the relationship and not the label that matters.

[25] The union also saw nothing significant turning on *Bryson* not referring to the objects of the Act. Mr Mitchell accepted that the Act's objects are important in an assessment under s 6.

[26] As to the issue about the reasons for control exercised by NZ Post as identified in Mr Wicks' submissions, Mr Mitchell's response was that they are irrelevant. A clear distinction was said to exist between the drivers in *Rasier* and the courier services to which this case relates.

[27] Other factors were referred to by Mr Mitchell to support the submission that a stay should be declined. At a substantive hearing one factor will be the defendant's statutory obligations; he noted that subject is not currently before the Supreme Court. He referred to the State-Owned Enterprises Act 1986, which includes obligations of social responsibility and to be a good employer in s 4(1)(b). The submission was that there is an expectation that a state-owned enterprise will treat employees differently from what might be expected from other companies.

[28] Mr Mitchell's response to Mr Wicks' submission, about *Rasier* raising an issue over the approach to vulnerable workers, was that the union does not intend to rely on such an argument. He added that Ms Moat and Mr Wood do not consider that they were vulnerable in the sense of having a poor understanding of what they were signing.

[29] Turning to the interests of justice, it was submitted that the parties require a decision so that the union and its members are aware of the members' status. The focus of the company on the use of contractors, and the intention to contract out deliveries, was stated to be the reason for this proceeding needing to be determined. That was a reference to Mr Hunter's evidence and the prospect that redundancies will occur, although I was advised that the beginning of any business restructuring is some time away.

[30] The plaintiff did not accept that this litigation does not need to be resolved promptly. While the claim is not urgent, it is important to the parties and some finality is being sought.

Analysis

[31] In the November 2024 judgment on the first application for a stay, the power to grant one was described as discretionary.[8] I considered that what must be taken into account in exercising that discretion is whether staying the proceeding would be in the interests of justice. That is a broad assessment which must include the reasons for applying for a stay, its proposed duration, the interests of the parties and the efficient

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8 *Postal Workers Union of Aotearoa Inc*, above n 1, at [9].

use of scarce judicial resources. In presenting their submissions, Mr Wicks and Mr Mitchell did not suggest that the discretion must be exercised in a different way or involved additional considerations.

[32] I am not persuaded that a stay should be granted. Previously, I referred to unattractive difficulties that would arise if a stay was granted. The first of them was an element of speculation about the application for leave in *Rasier* which was then pending. Another reason was the potential delay; I stated that the impact of delay was not lessened merely because the case lacked urgency. I preferred to approach the application by considering that, in the absence of compelling reasons, the parties are entitled to expect a scheduled hearing to proceed.

[33] Mr Wicks argued that things had changed since the November judgment with the Supreme Court's leave decision. That submission can only be accepted up to a point. While NZ Post is confident that changes in the law will be made that are relevant to this case, they may not be made. There is also considerable force in Mr Mitchell's submission that there are sufficient differences between the cases to show that they are not completely comparable. A difficulty confronting NZ Post is that the Supreme Court's decision is unlikely to be dispositive of this litigation.

[34] I do not accept that the Supreme Court's leave decision by itself, or in combination with NZ Post's criticisms of the Court of Appeal judgment, can be accurately described as demonstrating uncertainty in aspects of the tests related to s 6. Certainly, the appellant in *Rasier* is entitled to seek to appeal the conclusions reached by the Court of Appeal, but that is not the same thing as saying that there is presently some uncertainty about the law.

[35] I prefer Mr Mitchell's analysis that s 6 requires a factual inquiry (a conclusion reached in *Bryson* and in the Court of Appeal's decision in *Rasier*) where all relevant matters must be considered.[9] The tests referred to in *Bryson* were to assist that inquiry and to determine what matters should be taken into account.

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9 *Bryson*, above n 4, at [32]; and *Rasier Operations BV,* above n 1, at [97].

[36] The proximity of the Supreme Court appeal, in July this year, does have a bearing on this assessment because it indicates how long a stay might be necessary for if one is granted. Given a hearing in the Supreme Court in the middle of this year and, allowing time for a judgment to be released, it is highly unlikely the parties will be in a position to accept a further fixture date in this Court until the last quarter of this year at the earliest. Given the other commitments the Court has, that means a hearing before the first quarter of 2026 is the best that might be anticipated at this stage. That would lead to a significant delay for both parties, especially considering the length of time this proceeding has been pending. The length of the delay, coupled with the union's determination to proceed, point against granting the application.

[37] That leaves for consideration whether declining the application would result in wasted expense for the parties, particularly if either one of them considered that the outcome required an application for leave to appeal to the Court of Appeal, if only to preserve its position while waiting for the Supreme Court's decision. That was an issue I raised with counsel during the hearing and which Mr Wicks identified as a feature which ought to be weighed up in this application. The inevitability of such an appeal and, if it was successful, the additional expense and delay that would occasion a rehearing was said to favour granting a stay. Mr Mitchell's response was that the issues are sufficiently significant for both parties, given NZ Post's business model and the consequences for the union and its members, that whichever party is unsuccessful an appeal would be almost inevitable.

[38] While Mr Wicks' argument about the risk of wasted expense has some attractiveness, what tips the balance in favour of Mr Mitchell's response is the significance the union places on this litigation and its preparedness to proceed. In doing so the union accepts the cost and risk associated with this course of action.

Outcome

[39] The application is unsuccessful and it is dismissed.

[40] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 3.20 pm on 14 February 2025