

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** James Bryson (Applicant)  
**AND** Three Foot Six Limited (Respondent)  
**REPRESENTATIVES** Michael Gould for the Applicant  
Keith Binnie for the Respondent  
**MEMBER OF AUTHORITY** Paul Stapp  
**INVESTIGATION MEETING** Wellington 26 November 2002  
**SUBMISSIONS AND  
FURTHER EVIDENCE** 28, 29 November 2002, 3, 4 and 6 December 2002  
**DATE OF DETERMINATION** 7 January 2003

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

This is an employment relationship problem lodged by Mr. Bryson. The matter has been opposed by Three Foot Six Limited on the grounds that Mr. Bryson was a contractor and not an employee. This issue is the subject of this determination.

If there is a finding that Mr. Bryson was an employee then there is an issue of him raising a personal grievance in the 90 days required under the Employment Relations Act 2000. There is also an issue raised by Three Foot Six Limited in regard to damages and breaches.

**The facts**

Mr. Bryson commenced his engagement at Weta workshop making miniatures for the Lord of the Rings project. He transferred to Three Foot Six Limited (Three Foot Six) in April 2000 as an on set model technician. Initially he did not sign a contract.

Mr. Bryson signed a contract called a 'Crew Deal Memo' on 30 October 2000 and Three Foot Six on 1 November 2000. In essence the contract purports to be a contract for service.

## Determination

It is my determination on the evidence from affidavits, the Authority's investigation meeting and documents produced that Mr. Bryson was a contractor for the following reasons:

- Section 6 (5) of the Employment Relations Act 2000 determining the 'real nature' of the relationship between the parties.
- Under section 6 (5) of the Act considering all relevant matters including the intention of the parties but not as a determining factor.
- The usual tests including the parties' original intentions, any written statement, the level of control, the extent of integration in the business, personal business interest and the economic reality of the relationship.
- The case law: see *Koia v Carlyon Holdings Ltd* (unreported 20 August 2001 Goddard CJ, Travis and Colgan JJ AC 56/01) and *Curlew v Harvey Norman Stores (NZ) Limited* (unreported 19 July 2002 Colgan J AC 46/02). Also see *Hook v J B's Contractors Ltd* (unreported 22 March 2001 J Wilson AA21/01).
- The parties very clearly intended to contract for services (the documents).
- The parties' contract specifically spells out the contractual relationship as a contract for services. The clauses are consistent with a contractor relationship. For example there is a specific clause describing the relationship. Also there are clauses that make provision for fees/ACC, no entitlement to annual leave or sick leave.
- Clauses of the contract that appear on their face to be consistent with employment terms are based on industry practice. For example the contract makes provision for a standard working day, overtime, provision of paid meals, penal pay, provision of safety equipment and breaks.
- The industry practice in New Zealand to engage film crews as contractors. The practice of this movie was for crew to be engaged as contractors.
- The tax arrangements where withholding tax was deducted from all crew. IRD confirmed the arrangement for the project. Mr. Bryson filed tax returns as a self-employed person. He claimed deductions on expenses for petrol, comics, books, clothing, office furniture, movies, tools, cafes and supermarket.
- Mr. Bryson willingly albeit belatedly entered into the contract arrangement. He did not convince me that he had to sign the agreement under duress but chose to do so or not be included on the 'screen credits list' as part of the arrangements that were transparently documented and applied to others as well as to him.
- The evidence that is indicative of an employment relationship includes fixed start and finish times, fixed meal break, a standard week, daily call sheets, daily meetings, company permission to work for other parties, permission to take time off and weekly pay. There was also evidence of pay slips existing with reference to 'employee' and 'salary' and 'PAYE'. These are off set by the following:
  - (a) The necessity to meet deadlines for the release of the Film that is consistent with production schedules and funding. This was a distinctive project.
  - (b) The common feature of contracting for movie/TV productions in New Zealand.
  - (c) Documents 9 and 12 indicate the best practice arrangements for the engagement of contractors in drama productions.
  - (d) The IRD rulings that such provisions are not determinative of employment status.
  - (e) The existence of changed terminology such as 'contractor' and 'withholding tax' that do not appear to have emerged for any ulterior motives other than to

come in to line with the industry practice and alignment of computer programmes.

- (f) The funding arrangements for the project that underpin the scheduling required for running the project and the role of the producer (Barrie Osborne).
- Factors consistent with a contractor arrangement in terms of control include the following:
  - (a) Little or insignificant supervision of the work being carried out.
  - (b) Work governed by schedules.
  - (c) No uniforms.
  - (d) No formal training. No expectations of training on the job.
  - (e) No progress and review reports.
  - (f) Mr. Bryson decided how to do the work that he was required to undertake and use his time, even although I accept that he might have asked what to do. This was countered by Paul Van Ommen's (Head of the Miniature's Department) evidence that he expected people to be self-reliant.
  - (g) The requirement was that people were producing a common project; a movie 'The Lord of the Rings' trilogy.
  - (h) Simple pay roll arrangements and the provision of time and pay forms that are not inconsistent with business practice and accounting in a contracting relationship.
- Mr. Bryson was required to do his own work. There was no evidence of any employee being required to carry out his work in his absence.
- Mr. Bryson supplied his own tools albeit not necessarily all the tools required. Fundamentally the ownership of personal tools is a feature of the engagement of the miniature technicians. Indeed Mr. Bryson accepted there was an expectation and understanding that he would supply his own tools but could use other tools available. The supply of tools was specifically covered in the contract: see clause 38 of the contract that provides for the contractor to provide their own tools.
- Mr. Bryson was responsible for the compliance with tax, ACC payments as a self employed contractor.
- Three Foot Six had no liability for lost tools; see clause 38 of the contract.
- Mr. Bryson was responsible for repairs of equipment rented by the producer: see clause 38 of the contract.
- Mr. Bryson was engaged as a contractor during his time at Weta: see his tax returns and his contract from his time at Weta.
- Mr. Bryson invoiced Three Foot Six.
- Mr. Bryson could work for someone else so long as he had permission.
- Mr. Bryson had at other times worked for other projects and productions at Weta and Kids TV in contracting arrangements that he accepted.
- Mr. Bryson says he was a freelance model maker in the film industry since 1994. His CV supports him being self-employed for the past 10 years.
- The funding arrangements for movie production. The industry norm that could be compared with other contracting in the building and construction industry, fishing industry, broadcasting and the real estate industry. The very nature of the creative work, deadline driven production arrangements and personal involvement of the individuals concerned including performers, technicians, film makers, producers and the director and their hierarchy.
- The final factor is the funding arrangements of the movie that requires accountabilities and scheduling.

I have considered all the relevant matters so as to distinguish the real nature of the relationship where there was a contractual intention to contract for services.

I hold that the evidence on balance about the levels of control, the extent of integration and the economic reality of the situation assist to determine the real nature of the relationship. This is a matter more to do with the performance of the contract (having regard to the industry practice and the nature of the movie project) rather than going to the nature of the contract (having regard to parties' practice, intentions and the features akin to an employment relationship in the arrangements of the contract).

Also I have considered that Mr. Bryson had no ability to make a profit from his productivity and creativity and could not employ staff. He was not GST registered and did not involve a company of his own. He made no significant investment in plant, equipment other than purchasing some of his own tools incurring expenses claimed for tax deductions. These I accept are part and parcel of the nature of the industry and film production arrangements.

I have also considered the industry practice in New Zealand distinctive from the American situation. There employment relationships developed because of tax. In New Zealand there has been no historical imperative to support any change to the arrangements that apply compared to America. This factor has little significance.

I accept that on balance there are features that are associated with employment arrangements but overall I am satisfied the evidence supports a contract for services between the parties.

Thus I hold that the tests support on the balance that Mr. Bryson was a contractor.

Costs are reserved.

Paul Stapp  
Member of the Authority