Employment Court of New Zealand

Leota v Parcel Express Limited [2019] NZEmpC 152 (1 November 2019)

Last Updated: 8 November 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 152
EMPC 167/2019

IN THE MATTER OF	an application for a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for leave to appear and be heard as intervener
BETWEEN	MIKA LEOTA Plaintiff
AND	PARCEL EXPRESS LIMITED Defendant

Hearing:	On the papers
Appearances:	G Pollak and M Pollak, counsel for plaintiff P Robertson, counsel for defendant A Evans, counsel for Freightways Ltd
Judgment:	1 November 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for leave to appear and be heard as intervener)

Introduction

[1] Freightways Limited (FL) has applied for leave to appear and be heard as intervener at the hearing of this proceeding. The application is opposed by the plaintiff and supported by the defendant.

[2] In the proceeding, the plaintiff seeks a declaration under s 6(5) of the Employment Relations Act 2000 (the Act), as to whether he was an employee of the defendant. He says he was employed as a courier driver. If the declaration is made,

he proposes to pursue a personal grievance alleging he was unjustifiably dismissed. The defendant asserts Mr Leota worked as an independent contractor.

[3] The grounds relied on by FL in support of its application are in summary:

a. FL has an interest in the question of whether a person such as the plaintiff working as courier is a contractor or an employee. The findings of the Court could have potential impact on all couriers in New Zealand, and, on FL's business, since it operates a network of owner-driver contractors. FL uses standard form contracts, similar to those utilised by other courier companies, including the defendant. It is asserted that the performance of services (including the network and/or point-to-point courier-driver methods of delivery, use of relief drivers, and manner in

which freight is delivered) is materially similar across courier businesses.

b. A determination as to the plaintiff's status under s 6(5) of the Act could be capable of wide application. This case may set a precedent, which individual judges would regard as binding, or highly relevant, in the future. The plaintiff proposes to call evidence that there is a standard courier operating model, and standard courier practices across the industry, which are inconsistent with contractor status. It is asserted the declaration sought is intended to have wide ramifications for courier companies. Were it to be held the plaintiff was an employee, necessary changes to courier businesses may follow, and affect how services are to be provided to an end user.

c. There is a longstanding, and settled, common law position in New Zealand that couriers are classified as contractors.1 The plaintiff's declaration seeks to alter this settled status.

d. The Court may be assisted by the intervention of FL. It has knowledge and understanding of how these proceedings will influence other courier drivers in practice. It has unique experience and insight into the courier

1 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 689.

delivery industry as the operator of nine major courier delivery brands, its market share and longevity in the industry. Due to the nature of the application, and the fact there may be limited rights of appeal, this case presents the first and only opportunity for the Court to address factual issues on industry practice.

e. If granted leave, FL would not duplicate submissions unnecessarily, would not lead evidence, would not cross-examine witnesses, and would not seek costs regardless of the outcome of the proceeding,

[4] The plaintiff's grounds of opposition in summary are:

a. The focus will be on the entire factual matrix, and how the terms and conditions between the plaintiff and the defendant operated in reality, so that the real nature of the relationship can be determined in accordance with the established tests under s 6. FL has no knowledge of the particular factors which will assist the Court in determining the real nature of the relationship between the parties.

b. The parties are calling evidence about industry practice, and the defendant is free to call specific evidence of what FL may have in place for its own drivers, to support its position. Industry practice may be a legitimate background factor for consideration, but it will not necessarily be determinative.

c. Evidence to be called for the plaintiff shows a variety of operating models in the industry. Different factors may apply to different models. Any decision about the parties' relationship in this case will not be binding on any other party and will not necessarily even be applicable to any other courier business.

d. There have been a number of s 6 cases brought under the Act since

Cunningham.

e. FL is not an industry body, nor is it in a position to address the Court on any matter relating to the parties in this case. It could only ever address the Court about its own business activities.

f. While FL's contracts may be similar to those used by the defendant, the way in which it operates those contracts will differ as the size of FL's operation is considerably larger than the defendant's.

g. FL could only represent its own commercial interests. It could not represent the industry and does not purport to do so. If its application were to be granted, then any other courier business would be able to apply to join the proceedings as well.

h. Concerns were also raised as to the additional time involved in the hearing, were intervener status to be approved. The addition of such a party would simply prolong the hearing and could not add anything of significance or assist the Court.

[5] FL's submissions in response are in summary:

a. The nature of the declaration being sought by the plaintiff is of general importance and will have an impact on others. The Court has previously indicated that the ambit of a s 6 application could extend beyond named parties and affect other working relationships in the same class.2

b. The plaintiff's working arrangements, requirements as to tools of trade, the manner in which his run was operated, and invoicing processes were in fact typical of the industry.

c. The plaintiff proposes to call evidence of industry practice which confirms the fact that the Court will need to consider courier driver arrangements in New Zealand collectively.

2 *Lowe v New Zealand Post Ltd* [2003] NZEmpC 103; [2003] 2 ERNZ 172 (EmpC) at [16].

d. FL has a demonstrable interest in the proceeding in that it may change settled law and could result in significant changes in the manner in which FL, and its owner drivers, operate their courier businesses and the resulting financial impact on customers.

e. Its involvement would not elongate the hearing unnecessarily; presentation of legal submissions would be unlikely to take longer than an hour and would focus on any areas that, in its view, could be helpfully expanded on for the Court.

f. There would be value in the Court receiving legal submissions from FL; there would not be any prejudice to any other party,

and the Court will be able to reassure itself that it is in possession of all relevant legal arguments before making a declaration that could have wide effect.

Principles

[6] It is well established that the Court has jurisdiction to grant such application under cl 2(2) of sch 3 to the Act. The test is whether, in the opinion of the Court, the applicant "is justly entitled to be heard". It is a very broad test, to be determined on the particular circumstances of the case.

[7] The starting point must be that an intervener should establish a sound basis for the Court to depart from the traditional privity of litigation, especially where the application is opposed.3

[8] The power should be exercised with restraint to avoid the risk of expanding issues, elongating the hearing and increasing costs.4

[9] The discretion may be exercised more liberally in cases involving the Court's special jurisdiction under legislation such as the Act.5

3 *Seales v Attorney-General* [2015] NZHC 828 at [43].

4 *Drew v Attorney-General* [2001] NZCA 107; [2001] 2 NZLR 428 (CA) at [11].

5 *New Zealand Fire Service Commission v Ivamy* [1995] NZCA 374; [1996] 1 ERNZ 591 (CA) at 592.

[10] In a case involving issues of general and wide importance, the Court may grant leave when satisfied it would be assisted by submissions from the intervener.6

[11] I proceed on the basis of these principles.

Analysis

[12] Essentially, FL seeks leave to present submissions. It does not propose to call evidence or cross-examine witnesses. The application must proceed on that basis.

[13] This is not a test case as to the correct interpretation or approach in applying s

6 of the Act. Those issues were authoritatively settled by the Supreme Court in *Bryson v Three Foot Six Ltd*.7

[14] I agree that whether or not the plaintiff is an employee depends "upon the entire factual matrix";8 the analysis is an "intensely factual" one.9 In the end, it will require an evaluation by the Court as to the way in which the relationship operated in practice; all the circumstances must be examined to determine the real nature of the relationship.

[15] That said, one of the factors which the plaintiff proposes to raise with the Court relates to industry practice. This is a topic in which FL has a distinct and direct interest.

[16] Moreover, it is arguable that the question as to how owner-driver couriers often operate has been settled for some time. Thus, in *Ike v New Zealand Couriers Ltd,* Toogood J said in 201210:

It is well settled that courier drivers engaged on the basis set out in Mr Ike's contract with NZ Couriers are not to be treated as if they were employees.

[17] The settled position referred to by the High Court is a reference to the conclusions of the Court of Appeal in *Cunningham* in 1993, under the Employment

6. *Wellington City Council v Woolworths New Zealand Ltd* [1996] NZCA 713; [1996] 2 NZLR 436 (CA); *Drew v Attorney-General*, above n 4, at [17]; *Chamberlains v Lai* [2005] NZSC 32 at [5]; *Wilson v Attorney-General* [2010] NZHC 2279, (2010) 19 PRNZ 943 (HC) at [19].

7 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.

8 At [6].

9 *Franix Construction Ltd v Tozer* [2014] NZEmpC 159, [2014] ERNZ 347 at [44].

10 *Ike v New Zealand Couriers Ltd* [2012] NZHC 558, (2012) 9 NZELR 348 at [24].

Contracts Act 1991. It would be inappropriate to predict whether the facts in this case are similar to those considered in *Cunningham*, and/or whether a s 6 analysis under the current Act may give rise to a different outcome. But the possibility that the findings made in this case could have implications for other parties who currently organise their affairs in light of the conclusions reached in *Cunningham* cannot be ruled out at this stage.

> [18] Another relevant consideration relates to the declaratory procedure being adopted in this instance. With regard to an owner-driver case, Judge Colgan observed in 2003:11

Although similar decisions have been reached under past regimes in the context of personal grievance cases, s 6 for the first time in New Zealand employment law establishes a means for determining the legal status of a working relationship by a form of statutory declaration. Inherent in a legal and institutional structure that emphasises the importance of immediate parties (individual and corporate) nominated in a particular case, *is now a process that acknowledges and requires the Court to cater for the reality that there may be a substantial number of other persons who, although not named parties in the litigation, will or may be significantly affected by a decision under s 6(5). So the Court must not only do justice according to law between the nominated parties to a proceeding, but must also acknowledge and take into account the consequences of both the litigation and the decision of it upon others in other working relationships*.

> [19] Whilst it is correct to say that FL is not an industry body as such, the evidence before the Court is that it operates a group of companies which provide (amongst other services) a significant range of courier services. These include New Zealand Couriers, Post Haste, Now Couriers, Castle Parcels, Sub60, Kiwi Express, Security Express, DX Mail and Stuck. It is said to be one of the two largest publicly listed companies providing courier services in New Zealand, with a market share of approximately 40 per cent. It is, in my view, a party that can legitimately say it has a demonstrable interest in the declaration which is sought from the Court.
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> [20] Against the factors just summarised must be weighed the question of whether the grant of intervener status would have an unfair effect on the length of the hearing and costs. I am satisfied that these detriments can be mitigated by requiring FL to file

11 *Lowe v New Zealand Post Ltd*, above n 2, at [16] (emphasis added).

and serve written submissions in advance of the hearing and addressing them at the hearing only with leave of the Court.

> [21] Standing back and balancing the interests of the parties, I am satisfied that the application should be granted as follows:
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> a. FL is to be served by the defendant with all pleadings and documents filed in the proceeding, and a copy of any agreed bundle of documents prepared for the substantive hearing.
> b. It is granted leave to file written submissions with regard to the plaintiff's application for a declaration under s 6(5) of the Act; such submissions must be filed and served by 13 November 2019, or such other date as may be fixed by the trial Judge.
> c. It is granted leave for its counsel to appear at the substantive hearing; but not to call evidence or cross-examine any witness.
> d. It is not to address the Court on its submissions unless leave to do so is granted by the trial Judge.
> e. FL may not seek costs against any party.

B A Corkill Judge

Judgment signed at 11.00 am on 1 November 2019