



# Employment Court of New Zealand

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## Leota v Parcel Express Limited [2019] NZEmpC 160 (12 November 2019)

Last Updated: 18 November 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 160](#)

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 rulings as to the admissibility of evidence

BETWEEN MIKA LEOTA  
Plaintiff

AND PARCEL EXPRESS LIMITED  
Defendant

AND FREIGHTWAYS LIMITED  
Intervener

Hearing: On the papers

Appearances: G Pollak and M Pollak, counsel for  
plaintiff P Robertson, counsel for  
defendant

Judgment: 12 November 2019

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for rulings as to admissibility of evidence)

[1] Mr Leota is seeking declarations from the Employment Court as to his employment status pursuant to [s 6](#) of the [Employment Relations Act 2000](#). The hearing is set down for 20, 21 and 22 November 2019. Briefs of proposed evidence have been filed by both parties. This has spawned an application by the defendant for orders ruling various parts of the plaintiff's proposed evidence inadmissible. That application is opposed by the plaintiff. The parties agreed that the application could be dealt with on the basis of the documents filed.

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[2] The defendant's original objection to the proposed evidence covered a number of grounds, some of which fell away during the course of a telephone conference on 1 November 2019. The remaining issues relate to the entirety of Mrs Va'a's proposed brief of evidence (on the basis of relevance and hearsay) and four paragraphs of Mr Leota's proposed evidence which is said to contain inadmissible hearsay, contrary to [s 17](#) of the [Evidence Act 2006](#).

[3] The starting point to evidence objections in the Employment Court is not the [Evidence Act](#).<sup>1</sup> That is reflected in [s 189](#) of the [Employment Relations Act](#), which makes it plain that this Court is not bound by the strict rules of evidence applying in some other courts. Rather, the Employment Court may: "accept, admit, and call for such evidence and information as in equity and good conscience it sees fit." As observed in *Pender*:<sup>2</sup>

[52] ... The references to "evidence" and "information", and the power to not only admit evidence and information

but “accept” and “call for” it, indicate a clear Parliamentary intention that the Employment Court be empowered to undertake a much fuller inquiry than would be possible under strict rules of evidence. It follows that it is not enough that the Court be satisfied that a brief of evidence contains a hearsay statement and that none of the exceptions in the [Evidence Act](#) applies.

[53] To put it another way, consideration of whether or not evidence and/or information should be “admitted”, “accepted” or “called for” in this Court will be informed by a broader inquiry than simply whether the proposed evidence and/or information would be admissible in the High Court, although the principles expressed in the [Evidence Act](#), including those in [s 6](#), may assist in the assessment process. The starting point is, however, the Court’s broad discretion in [s 189](#), and it is the twin principles of equity and good conscience which must be looked to for the guiding light in exercising the Court’s discretion under that provision.

[4] In order to determine the extent to which proposed evidence may or may not be relevant, it is necessary to consider the matters at issue in the proceeding. That is because relevant evidence has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding. The matter at issue in this proceeding is whether Mr Leota is an employee for the purposes of the [Employment Relations Act](#). As is well established, determination of that question involves a combination of fact and law, including an assessment of indicators pointing to the way

1 *Lyttelton Port Co Ltd v Pender* [2019] NZEmpC 86.

2 (footnotes omitted).

in which his work was conducted on a day-to-day basis and features of control and integration. It is a necessarily broad inquiry. Relevance needs to be assessed through this lens.

[5] I start with the objections to Mr Leota’s proposed evidence. The defendant seeks rulings that paragraphs 7, 8, 9 and 10 not be read on the basis that they contain inadmissible hearsay.

[6] The proposed evidence in these paragraphs is directed at what Mr Leota perceives to be the working environment at the defendant company, including the characteristics of others who work there as drivers; the manner in which he says payment is made to the drivers, and how he received payment during his training period; and the impact of the alleged practices of the company in respect of how payment is dealt with and alleged bond payment requirements imposed by the company.

[7] All of this is broadly relevant, including by background context, to the key matter at issue in these proceedings. I do not accept that paragraphs 7, 8 and 10 contain statements made by a person other than Mr Leota. It is less clear where the statements in paragraph 9 emanate from. Any concerns in that regard can be dealt with by way of weight.

[8] There are multiple objections raised in relation to Mrs Va’a’s proposed evidence, many on the basis of relevance. Mrs Va’a sets out the concerns she says she has had over time about how the business operated and the situation that many drivers were in. She says that because of her concerns she spent some time explaining to the drivers, including the plaintiff, how their contracting agreement worked. She sets out what she understood their concerns to be, including from discussions she says she had with various drivers, and her reaction to the situation as she perceived it to be. All of this is broadly relevant to the matters to be determined in these proceedings, including by way of background context.

[9] Discussions that Mrs Va’a says she had with Mr Leota are not problematic on the basis of hearsay. That is because Mr Leota is giving evidence. Mrs Va’a refers to

a number of conversations she says she had with other drivers who are said to have talked to her about their perceived status. None of these people are giving evidence. There is no suggestion that they are otherwise unavailable. The defendant has responded to this proposed evidence in its briefs, denying the underlying assertions. While I accept that the defendant has a basis for its concerns about this evidence, in the broader circumstances I do not propose to order the exclusion of it. Rather it will be dealt with on the basis of weight. The point is that unsubstantiated assertions said to have been made by non witnesses who are otherwise available seldom carry much, if any, weight for obvious reasons.

[10] The defendant objects to aspects of Mrs Va’a’s proposed evidence on the basis that she seeks to give expert evidence. The general rule is that evidence should comprise statements of fact, not statements of opinion. The main exception to this is expert evidence. Before a witness can give such evidence they must, of course, satisfy the Court of their expertise. Mrs Va’a does not purport to be an expert. That does not, however, mean that she cannot offer her own observations as to how the workplace operated and her perception of the impact of that on drivers such as Mr Leota. Further, the defendant’s complaints about possible prejudice need to be weighed against the fact that it has now filed briefs of evidence responding to the matters raised.

[11] I do not propose to exclude observations that Samoan drivers were being exploited (paragraph 6); that the company strictly controlled everything the drivers did (paragraph 9); that the drivers appeared to be vulnerable (paragraphs 10); as to a scanner's functionality (paragraphs 24, 25); that deductions acted as a penalty (paragraph 41); and that drivers were in a dependant position (paragraph 51); on the basis that it purports to be expert evidence. Plainly Mrs Va'a is not an expert and what she has to say cannot be approached as though it is expert evidence (see, for example, her proposed evidence at paragraphs 48 and 50 as to the status of the drivers). It will be up to the Court to determine, on the basis of the facts and within the applicable legal framework, whether the test for employment status has been met. And, while I accept that some of Mrs Va'a's proposed evidence contains hearsay statements (including as to what she says she heard about the company's reasons for the facilities provided to drivers, paragraph 34), I do not propose to exclude it in the circumstances. For completeness, I do not consider that paragraphs 16, 21, 24, 26, 34, 40, 42, 43, 44,

45, 49 and 57 purport to give expert evidence. Having said all of this, the parties should be aware that the Court is unlikely to draw much assistance from evidence which is not corroborated, and where supporting detail is lacking.

[12] Finally, I record that counsel for the defendant confirmed that no objection would be pursued in respect of the evidence of Mr Abbott. Nor did counsel wish to formally pursue the intended objections in respect of a settlement agreement in relation to Mrs Va'a's brief of evidence. These matters can accordingly be put to one side.

[13] In the circumstances, costs are reserved.

[14] Leave is reserved for either party to apply, on reasonable notice, for any further directions or orders.

Christina Inglis Chief Judge

Judgment signed at 1 pm on 12 November 2019

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