Department of Labour
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THEMES IN EMPLOYMENT LAW

July 2005

The Law on Independent Contractors and Employees: the Supreme Court's Decision in *Bryson v Three Foot Six Ltd*

NB: The comments included in this publication should not be read as representative of the view of the Court, Authority, or the Department of Labour. Rather, any view expressed is in the nature of an opinion only.

I INTRODUCTION

Mr James Bryson has been something of a chameleon. Through the employment institutions and appeal courts he has changed status four times – being first an independent contractor in the Employment Relations Authority,[1] then an employee in the Employment Court,[2] back to an independent contractor in the Court of Appeal,[3] and finally, following the Supreme Court's decision,[4] once more an employee.

The case, of course, was *Bryson v Three Foot Six Ltd*, and the issue before the Authority and the three courts was whether Mr Bryson was an employee or an independent contractor. Only if he was an employee could he bring a personal grievance in the Authority under the Employment Relations Act 2000 ("ERA"). This editorial considers the legal position when it comes to determining whether a worker is an employee or an independent contractor, following the Supreme Court's recent decision. It discusses the litigation history of the *Bryson* case, and then sets out the current law relating to determining a worker's status. This editorial begins, however, by setting out the relevant statutory provision.

II THE MEANING OF "EMPLOYEE": SECTION 6 OF THE ERA

The meaning of "employee" under the ERA is almost identical to its meaning under the previous legislation, the Employment Contracts Act 1991. What is new is the Legislature's direction to the Authority and the Court on how to go about deciding whether a worker is an employee or an independent contractor. The relevant parts of s6 are set out below:

> **6. Meaning of employee—**
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> (1) In this Act, unless the context otherwise requires, ``employee''—
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
> …
> (2) 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.
> (3) 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.

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[1] *Bryson v Three Foot Six Ltd* unreported, P Stapp, 7 January 2003, WA 1/03.
[2] *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 ("*Bryson*, EC").
[3] *Three Foot Six Ltd v Bryson* unreported, McGrath, William Young and O'Regan JJ, 12 November 2004, CA 246/03.
[4] *Bryson v Three Foot Six Ltd* unreported, Elias CJ, Gault, Keith, Blanchard and Tipping JJ, 16 June 2005, SC CIV 24/2004 ("*Bryson*, SC").

Emphasis has been added to the phrases “real nature of the relationship” and “all relevant matters”. These are key phrases in s6, and were the focus of some discussion in the Supreme Court’s decision.

III BACKGROUND: THE HISTORY OF BRYSON

Between April 2000 and August 2001 Mr Bryson worked as a set model technician for Three Foot Six, which was established to administer the production of the film ‘The Lord of the Rings.’ He sought to bring an unjustified dismissal claim by way of a personal grievance in the Authority. The Authority, however, found that he was an independent contractor and so was unable to do so. On a de novo challenge to the Employment Court, Shaw J held Mr Bryson was an employee. The Court of Appeal (by a 2:1 majority, with McGrath J dissenting) allowed Three Foot Six’s appeal, and found Mr Bryson was an independent contractor. Finally, the Supreme Court overturned the Court of Appeal decision and restored the Employment Court’s decision: Mr Bryson was an employee.

The Court of Appeal’s decision was overturned on a technical (but important) point. Section 214 of the ERA limits appeals from the Employment Court to the Court of Appeal to questions of law. The construction of a document (such as a written agreement) is categorised as a question of law. However, the Supreme Court held that, because s6 of the ERA states that the Court or Authority must “consider all relevant matters”, the Court or Authority must take into account other relevant matters even if the written contract between the parties is apparently comprehensive (para 23):

> Accordingly, s 6 mandates an inquiry by the Court or the Authority for the purpose of determining a question of fact. The ultimate conclusion reached by the Court in a given case concerning the nature of the relationship [between the parties] is thus not ordinarily amenable to appeal to the Court of Appeal under s 214.

While the Employment Court’s conclusion about the nature of the parties’ relationship would not ordinarily have given rise to a question of law, the Supreme Court gave examples of two possible errors of law which could arise. One error would be if the Employment Court had misdirected itself on the requirements of s6. The second possible error would be if there was no evidence to support the Employment Court’s conclusion. However, the Court of Appeal could not allow an appeal from the Employment Court simply because it thought the application of the law to the facts could result in another (and its view, better) answer, if the Employment Court’s decision was also open to it on the facts. In this case the Supreme Court was unable to uphold the Court of Appeal’s decision because there was no error of law in the judgment of the Employment Court.

The practical outcome of the Supreme Court’s judgment is that, supplemented by any comments from the Supreme Court, the Employment Court’s decision is the final word on the law about independent contractors and employees in relation to these particular parties.

IV THE LAW ON INDEPENDENT CONTRACTORS AND EMPLOYEES

In the Employment Court's decision, Shaw J summarised the principles relating to s6 of the ERA. Referring to this passage, the Supreme Court stated[5]:

> …Judge Shaw accurately states what the Court must do and lists the matters which are relevant.…The only criticism which might fairly be made of the Judge's list is that it does not expressly direct attention to the substantive contractual terms upon which the *TNT* case[6] places emphasis, but it is clear…that she was very much alive to the need to begin by looking at the written terms and conditions which had been agreed to by Mr Bryson and Three Foot Six.

Taking this comment into account, these are the principles for the Authority or the Court to consider when determining whether a worker is an employee or and independent contractor[7]:

- The Court must determine the real nature of the relationship.
- [The starting point is an analysis of the terms and conditions which the parties have agreed to.][8]
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

In the rest of this section, these principles, and their application to the facts in Bryson, are examined more closely.

A The Terms and Conditions of the Contract or Agreement

Section 6(3)(b) of the ERA makes it clear that any statement by the parties about the nature of their relationship is not a determining matter. Nonetheless, "all relevant matters" in s6(3)(a) of the ERA "certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship."[9]

The first step Shaw J took was to set out the contractual rights and obligations agreed between the parties. Mr Bryson was working for Three Foot Six as a set model technician for approximately six months before he was given a written contract, known in the film industry as a "crew deal memo". Throughout the crew deal memo Mr Bryson was referred to as the "Contractor". This crew deal memo was subsequently printed on the back of tax invoices which had to be completed each

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[5] *Bryson*, SC, para 32.
[6] *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681.
[7] *Bryson*, EC, para 19.
[8] Inserted in accordance with the Supreme Court's decision.
[9] *Bryson*, SC, para 32.

week to secure payment for work done. The tax invoices required a signature, and it was stated that signing meant the contractor acknowledged and agreed to the terms and conditions on the reverse of the invoice. One of these conditions was:

> INDEPENDENT CONTRACTOR: The Contractor is engaged as an independent Contractor and not as an employee of the Company. Nothing in this agreement shall be deemed to create a joint venture or partnership.

Shaw J also set out other relevant conditions contained in the written agreement. These included the prohibition on accepting other engagements without the written approval of Three Foot Six; confidentiality clauses; that withholding tax was to be deducted from the gross rate of pay; stipulated working hours; double time or a day in lieu for working on a statutory holiday; payment for accommodation outside Wellington; use of private vehicles; that business calls only were to be made on production phones; provision of special protective equipment or clothing by Three Foot Six; the producer's discretion regarding payment for sick leave; that copyright attaching to the contractor's services was to be owned by Three Foot Six; that items created by contractor were to be the property of Three Foot Six; purchases by the contractor were to be authorised in advance; and that insurance on equipment or tools rented from the contractor was the responsibility of the contractor.

Shaw J concluded that it was "questionable whether the crew deal memo reliably indicates the real nature of the contract…. [T]here are elements in the memo which are indicative of an employment relationship."[10] The Supreme Court held that it was open for the Employment Court "to conclude…that the crew deal memo did not give any reliable indication of the real nature of the relationship."[11]

B The Intention of the Parties

Under the Employment Contracts Act 1991, the question to be answered when determining the nature of the parties' relationship was what the parties intended it to be. For example, in Muollo v Rotaru, the Chief Judge stated that the nature of the parties' contract could "only be resolved by ascertaining what their intention was in relation to the type of contract they were making at the time that they made it."[12] However, s6(3)(a) of the ERA provides that "all relevant matters" includes "any matters that indicate the intention of the persons." The ultimate question for the Court or Authority is "the real nature of the relationship." Judge Shaw in Bryson emphasised at the beginning of her judgment that the "intention of the parties is still relevant but no longer decisive."

The Employment Court in Bryson found that it was "not possible to establish whether the parties had any common intention as to their working relationship."[13] Mr Bryson had not turned his mind to his status when he started working at Three Foot Six; he gave evidence that he did not understand there was any distinction between a contractor and an employee. As there was no written record of engagement at the

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[10] *Bryson*, EC, para 32.
[11] *Bryson*, SC, para 32.
[12] *Muollo v Rotaru* [1995] 2 ERNZ 414, 422.
[13] *Bryson*, EC, para 34.

commencement of his work (the crew memo deal appeared six months later), there was "no evidence of any mutual turning of minds to the true nature of Mr Bryson's employment at that stage." Three Foot Six did not contemplate Mr Bryson was anything other than an independent contractor, because that was the industry practice. Yet "[o]n the facts of this case, industry practice [was] of little use in establishing the intention of both parties…. Three Foot Six's assumption cannot be taken as determinative of the employment relationship."[14]

C The Operation of the Relationship in Practice

The Supreme Court's decision emphasised the importance of examining the operation of the relationship in practice:[15]

> "All relevant matters"…will also include any divergences from or supplementation of …terms and conditions [of the contract] which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature.

The Employment Court considered the operation of Mr Bryson and Three Foot Six's relationship in practice, alongside their written contractual terms, when it analysed the real nature of the parties' relationship under the common law tests. The Supreme Court further noted that "all relevant matters" in s6(3)(a) of the ERA:[16]

> …clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were clearly important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.

The Supreme Court went on to say that the three common law tests were not to be used exclusively but in conjunction with other relevant matters.[17] With those comments in mind, this editorial moves on to look at the common law tests as used in the Employment Court's decision.

1 The Control Test

The control tests looks at the degree of control exercised by the "employer" (used in a generic sense) over the worker. The more control the "employer" has, the more it indicates an employment relationship. Conversely, the less control the "employer" has (and therefore the more control the worker has), the more it is indicative of an independent contract arrangement.

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[14] *Bryson*, EC, paras 36 and 37.
[15] *Bryson*, SC, para 32.
[16] *Bryson*, SC, para 32.
[17] *Bryson*, SC, para 33.

Shaw J noted the following aspects about the parties' relationship:

- Mr Bryson required six weeks' training by Three Foot Six for his job as a set model technician. He was not employed in his area of expertise (model making).
- There was a daily routine on the set. The crew watched the rushes of the previous day's filming. The head of department then assigned set model work based on directions from the director of photography. Mr Bryson, and other technicians, prepared the models for the camera and then were on standby during filming. Mr Bryson received specific instructions about how to dress a model for filming.
- Mr Bryson said that there was no requirement to provide his own tools. He used his own cordless drill, large craft knife, and scalpel. Three Foot Six supplied all other tools such as saws and sanders, large machinery to lift and transport the miniatures, and other tools such as a cutting mat, paint brushes and a tape measure. It was standard practice for the model shop to replace damaged or lost personal tools (contrary to the crew deal memo).

The Employment Court concluded that:[18]

> This was not a situation where Three Foot Six called on Mr Bryson to perform work as and when it needed him. Mr Bryson was required to be at work between specified hours each day of the week and to perform the duties as directed on a day to day basis. This control was absolutely essential in an environment where the directors of the Lord of the Rings required constant and often urgent changes and adaptations to the models being filmed.
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> I conclude, therefore, that there was significant control imposed by the crew deal memo. This control was exercised by Three Foot Six over his work and how and when he did it. It was the sort of control which characterises a contract of service.

2 The Integration Test

The integration test considers how integrated the worker is into their "employer's" business. If a worker is part of the business in the sense that their work is an integral part of the business, it is more likely they are an employee, but if their work is only an accessory to the business, it is more likely they are a contractor.

Referring to the evidence set out above, Shaw J held that it pointed to "Mr Bryson's work being an integral part of Three Foot Six business."[19] The miniatures unit work was collaborative and team-based. Mr Bryson was not an adjunct to the unit, but an integral part of it.

3 The Fundamental Test

The fundamental test asks the question of "whether the contracted person has been effectively working on his or her own account."[20] Are they self-employed, or are they working for someone else?

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[18] *Bryson*, EC, paras 48 and 49.
[19] *Bryson*, EC, para 51.
[20] *Bryson*, SC, para 32.

Some of the evidence the Employment Court considered under this test related to Mr Bryson's tax status. Mr Bryson prepared his own tax returns from 1996 onwards, and claimed against his taxable income for expenses such as models, books, magazines, furniture, petrol and modelling tools. The tax return form he completed yearly – an IR3 – referred to the taxpayer as being self-employed. Mr Bryson never registered for GST. He received payslips from Three Foot Six which referred to deductions for PAYE. Judge Shaw accepted these were prepared in error, and were supposed to refer to withholding tax. Looking at this evidence, she concluded:[21]

> While tax status can be an indicator of what a person intends his contractual relationship to be, in Mr Bryson's case the evidence as to his tax status was less than conclusive. He accepted that while he was working for Weta Workshop he was employed as an independent contractor. When he began with Three Foot Six he continued to receive the IR3 forms from the Inland Revenue Department. He simply filled out the forms that were sent to him but I do not accept that he acquiesced to independent contractor status. A finding that he was an employee could have tax implications for him but that is a matter between him and the IRD.

Other than tax status, there was no evidence that Mr Bryson was acting as a separate business entity which contracted independently with Three Foot Six: "He had no separate legal identity as a trust, a company, a partnership, or even as a sole trader. His income from Three Foot Six was not linked in any way to the profits or losses made by that company. He was paid a regular wage based on an hourly rate."[22] Shaw J concluded that Mr Bryson was "an individual who took work as it became available regardless of how it was characterised by the person engaging him."[23]

In the Supreme Court, Three Foot Six again pointed to the taxation and invoicing arrangements as evidence the Employment Court was wrong to say Mr Bryson was not acting as separate business entity. The Supreme Court, however, held that in their view Shaw J was correct to feel those arrangements did not provide any support for Three Foot Six's case.[24]

D Industry Practice

Not every industry has a prevalent practice that either independent contractors or employees are used. Therefore in many cases before the Authority or the Court there will be no relevant evidence about industry practice. However, in Bryson there was a "considerable amount" of evidence given about the practice of the film industry to use independent contractors rather than employees. The majority of the Court of Appeal found that the way Shaw J dealt with industry practice amounted to an error of law. The Supreme Court disagreed, saying that she did not overlook the evidence of industry practice.[25]

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[21] *Bryson*, EC, para 55.
[22] *Bryson*, EC, para 56.
[23] *Bryson*, EC, para 56.
[24] *Bryson*, SC, para 39.
[25] *Bryson*, SC, para 35.

In the Employment Court, Mr Bryson submitted that industry practice was not relevant to the question of the kind of relationship the parties had entered into. While Shaw J said that industry practice was "far from determinative of the primary question"[26] ("an unexceptional general comment,"[27] according to the Supreme Court), it would be contrary to common law to completely disregard it. To do so "would mean the Court could not take account of matters which are important to the parties."[28]

Witnesses for Three Foot Six said that between April 2000 to March 2001 the film industry engaged nearly 30,000 independent contractors and approximately 1,600 employees. The statistics for March 2001 to July 2002 were 11,000 independent contractors and 1,000 employees. The Employment Court set out the evidence about industry practice, but compared it to evidence about Mr Bryson's situation:[29]

- Industry work is project-based and intermittent. Industry practitioners have transferable skills and work for several different producers during the course of the year. Mr Bryson, however, worked continuously for over a year for one production only.
- Few operators in the film industry are directly supervised. Many industry practitioners invest in their own plant and equipment, and operate as sole traders or small business. Mr Bryson had no such investment and was not a sole trader.
- The screen production industry has small company margins, with no money available to pay personnel for down time. This was not the case for Three Foot Six.
- In 1999 the IRD investigated Three Foot Six, and did not challenge the independent contractor status of certain cast and crew whose contracts were reviewed. There was however no full investigation into the employment status of the crew, and it appears that IRD accepted the status quo.

Shaw J acknowledged the "real and genuine concern that any changes to the present employment arrangements …will cause significant disruptions in the film industry with potentially adverse outcomes in both economic terms and in terms of attracting overseas film companies to bring the productions to New Zealand."[30] She concluded however that those concerns were overstated in the context of the case.

The Supreme Court found that the little significance the Employment Court placed on tax arrangements in terms of industry practice was "no doubt because those arrangements appear to have been mere consequences of the contractual labelling of [Mr Bryson] as an independent contractor."[31] In holding that Shaw J had made no error of law in relation to industry practice, the Supreme Court stated:[32]

> The Judge did not expressly state her conclusions about the influence, or lack of it, of the evidence concerning industry practice on her ultimate conclusion. But it is plain enough from comments made during her discussion of that evidence that she found it was of little weight in the case before her because Mr Bryson's working conditions did not appear to be typical of the industry. For that reason also, she considered that expressions of industry concerns were overstated. These were

[26] *Bryson*,EC, para 19.
[27] *Bryson*, SC, para 32.
[28] *Bryson*, EC, para 21.
[29] *Bryson*, EC, paras 58-67.
[30] *Bryson*, EC, para 68.
[31] *Bryson*, SC, para 37.
[32] *Bryson*, SC, para 38.

> factual conclusions which were open to her on one facet of the inquiry required by s 6.

What the Employment Court's decision in *Bryson* emphasises is that the Authority or Court should consider any evidence of industry practice, but remember it is the real nature of the relationship of the parties before it that needs to be determined. In other words, it is the nature of the parties' particular relationship rather than relationships in the industry in general which the decision-maker is concerned with. Evidence of industry practice in *Bryson* helped to explain the reasons why independent contractors are prevalent in the film industry, but those reasons did not apply to the relationship between Mr Bryson and Three Foot Six.

E The Real Nature of the Relationship

Taking all these matters into account, Shaw J concluded that despite statements in the crew deal memo to the contrary, Mr Bryson was an employee. She emphasised that this was solely based on Mr Bryson's individual circumstances, and was "not to be regarded as affecting the as yet untested status of any other employee in the film industry."[33]

The Supreme Court held that it could not be said the Employment Court had reached a decision inconsistent with or contradictory to the evidence about the nature of the parties' relationship:[34]

> The terms and conditions of the crew deal memo contained much that appeared to indicate a contract of service…. On the evidence, the Employment Court could take the view that Mr Bryson was not in business on his own account, taking the profits and running the risks of a sole trader… [T]he evidence about the industry did not seem to describe relationships similar to that of Mr Bryson with Three Foot Six. On the basis of the evidence as a whole it was open to the Judge to find, for the reasons she gave, that the real nature of their relationship was one of employment.

V CONCLUSION

The Employment Court's statement and application of the law relating to determining employment status to the facts of Bryson v Three Foot Six has received the Supreme Court's seal of approval. Shaw J's decision emphasised the importance, as stated in s6, of looking at all relevant matters to determine the real nature of the relationship between the parties. All relevant matters included the parties' contract, intentions, the operation of their relationship in practice, the application for the common law tests, and, if present, industry practice. The outcome for Mr Bryson is that he was an employee, and is now free to bring his personal grievance in the Employment Relations Authority.

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[33] *Bryson*, EC, para 75.
[34] *Bryson*, SC, para 40.