

CONTRACTOR OR EMPLOYEE?

Earlier this month the Employment Court considered a request from a courier driver to be declared an employee – Mika Leota and Parcel Express Limited [2020]] [NZEmpC 61](#). The Court commented on the employee’s obvious vulnerability. Although a longer read, it is worth reflecting on the facts of this case.

Summary

Mr Leota was a driver for a courier company, Parcel Express Ltd (Parcel Express). He asked the Court for a declaration that he was an employee. Parcel Express said he was an independent contractor.

Employee status is an important issue because it provides access to statutory entitlements, including minimum wages and holiday pay, to name two.

The Act requires the Court to determine the real nature of the relationship. Based on the evidence before the Court, it found that Mr Leota was an employee. The Court noted that Mr Leota speaks English as a second language. He did not have a grasp of the legal requirements relating to status (independent contractor versus employee). Nor did he have a grasp of the agreement that Parcel Express drafted and which he was asked to sign, or the associated documentation he was given.

Background and contractual provisions

The company was having difficulty retaining drivers. Mr Leota, who was not working at the time, understood that there may be an opportunity for him at Parcel Express and a meeting was arranged with the Managing Director. At the meeting Mr Leota was told that if he came to work for the company he would need to buy his own van; that the van would need to have Parcel Express signwriting; that the signwriting would cost about \$2,000 (which he would have to pay); that a bond of \$2,000 bond was required; and that he would need to sign a contract. The Managing Director told him that he would be his own boss.

Evidence was given that many of the drivers with Parcel Express were Samoan. A number worked with the company for less than a year; some abandoned their runs. Mr Leota’s agreement provided for a Bond of \$2,000.00 upon signing the Agreement, to be repaid by way of a monthly deduction of \$200.00 per month. Mr Leota’s bond was returned to him two months after he left the company. A number of other workers either did not receive any refund or received a partial refund.

The agreement also included restrictions on the colour, size and type of van required. No other “signwriting, colouring, insignia, names, signs, or notices of any kind” was allowed without approval. In addition, the van could not be disposed of without the company’s prior approval.

Mr Leota had to lease a scanner from the company and pay for any operating and repair costs. These costs were deducted from the regular payments the company made to him.

Mr Leota was assigned a run, the boundaries of which were set by the company and in which he had no say. He was required to work where and when directed by the company and to work in the company’s

best interests at all times. He was obliged to wear a uniform and to observe and comply with the company’s Procedures Manual. He was also required to comply with any “directions or requests of the Chief Executive Officer or any other manager or officer of the company”.

Among other restrictions, Mr Leota was prohibited from drinking any alcohol during work hours and had to attend and participate in any in-house briefings or instructions. He was to ensure that documentation was filled out “in accordance with Company procedures, policies and specifications. He had to obtain specific insurance cover with an insurance company approved by Parcel Express.

Mr Leota could not exceed 20 working days’ holiday in any 12-month period without the prior approval of the company and was required to organise a relief driver acceptable to the company when he was on leave.

The agreement also contained a restraint of trade clause for six months and within the 100-kilometer radius of the Auckland central business district.

Mr Leota worked for Parcel Express for about a year before the Managing Director asked him to pick up tyres from a particular company as “a favour” for a week. When Mr Leota pointed out that the pickup effectively cost him money, his contract was ended the following day.

The company then started raising a number of issues with Mr Leota’s performance, including customer complaints which were said to have been received by it. The company gave evidence that all of this was coincidental in terms of timing. Deductions were made from Mr Leota’s final pay as a result of the complaints.

Analysis

The Court observed that an employee works for an employer, within the employer’s business, to enable the employer’s interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

The essential issue in cases like these is therefore whether the worker serves their own business or someone else’s business. The following table of relevant factors was applied.

<i>Indicators</i>	<i>Employee</i>	<i>Independent Contractor</i>
Does the hirer have the right to exercise detailed control over the way work is performed, so far as there is scope for such control?	x	
Is the worker integrated into the hirer’s organisation?	x	
Is the worker required to wear a uniform and/or display material that associates them with the hirer’s business?	x	
Must the worker supply and maintain any tools or equipment?		x
Is the worker paid according to task completion, rather than receiving wages based on time worked?		x
Does the worker bear any risk of loss, or conversely have any chance of making a profit from the job?		x
Is the worker free to work for others at the same time?		x

Can the worker subcontract the work or delegate performance to others?		x
Is taxation deducted by the hirer from the worker's pay?	x	
Does any business goodwill accrue to the hirer?	x	
Does the worker receive paid holidays or sick leave?	x	
Does the agreement describe the worker as an independent contractor?		x

Parcel Express had a high level of control over Mr Leota's work, as seen in the requirement to comply with company procedures, any directions and requests of any officer of the company, attend training, the parameters of the run, who the customers were and how they were to be serviced, the clothes to wear, the sort of vehicle to drive and restrictions on its signage, the extent to which he was to be contactable by the company, the type of insurance cover to have and with whom and for how much, the amount of time off he was permitted to have and when, and the extent of the company's involvement in any leave arrangements. It also emerged in evidence that Parcel Express audited Mr Leota's mileage, although Mr Leota was unaware of this.

Despite being described as "his own boss", Mr Leota did not exercise any real degree of autonomy over his work with Parcel Express. The expectations around the pickup of tyres, and the company's reaction when Mr Leota raised concerns about undertaking this task, showed how the company viewed its relationship with him.

Economic reality

Parcel Express said that Mr Leota was free to "grow" his business as a courier driver. However, it appeared to boil down to the view that Mr Leota could spend time on his run cultivating new and existing customers. The Court pointed out that –

- Mr Leota did not have spare time to materially engage in client building exercises.
- in reality Parcel Express was asking Mr Leota to help it to build its own business. As the agreement made clear, it was not a business Mr Leota could take with him when he left as the company retained control of the customer lists and owned any goodwill Mr Leota had managed to generate.
- The company employed its own sales manager to develop new business opportunities. Mr Leota was expected to refer any new leads to her to follow up on behalf of the company.

Further, the payment mechanism that the company put in place meant that there was no guarantee that additional customers in a particular run area would result in increased business (in terms of financial reward) for an individual driver.

The Court said it had no difficulty finding that Mr Leota was not in business on his own account but was an employee of Parcel Express.

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