

Independent contractors

In May 2020 we reported on a case (*Mika Leota and Parcel Express Limited [2020] NZEmpC 61*) in which the Employment Court ruled on the differences between employees and independent contractors. The case, which dealt with courier drivers, caused a buzz.

In June this year the Court considered another case on the same issue (*Barry v CI Builders Limited ([2021] NZEmpC 82)*). Both judgements were given by the Chief Judge, Christina Inglis. As the latest judgement gives further insight into the Court's approach to the question, the edited [case summary](#) below is useful before considering some important comments made by the Court.

Mr Barry worked for a building company CI Builders Ltd (CIB) as a builder for around three years. CIB originally engaged him in a "hand-shake" arrangement as an independent contractor, without a written contract. Mr Barry claimed the actual relationship became an employer/employee relationship. He sought a declaration that he was an employee.

The Court found that while the initial intention was for the parties to have a hirer/independent contractor relationship, overall the factual context pointed more firmly to Mr Barry being an employee; he was not in reality operating a business on his own account.

In coming to that decision, the Court took into account that:

- Mr Barry worked under close control and direction of CIB, to suit CIB's business needs.
- Mr Barry worked relatively consistent hours for CIB over an extended period of time and did not work for anyone else.
- Mr Barry was integrated into CIB's business: from time to time, he drove a company vehicle; to an outsider there was nothing to distinguish him from any other workers on site.
- While Mr Barry was not required to wear a uniform or identify with CIB in other ways, there was no evidence employees were required to wear a uniform.
- While Mr Barry was not prohibited from working elsewhere it would have been unrealistic for him to do so, as he was working for CIB an average of 40 hours a week and spending three hours a day travelling to and from work.
- There was no evidence Mr Barry could subcontract or delegate his work.
- Mr Barry did not invoice CIB for his work but simply provided a screenshot of his hours.
- CIB applied for and was granted a wage subsidy for Mr Barry.
- Mr Barry did not provide his own tools for work, except for a tool-belt with some small tools.
- CIB paid Mr Barry by the hour rather than for completion of tasks.
- Mr Barry had no opportunity to make a profit from his work and any goodwill from his work accrued to CIB.

The Court made a declaration that Mr Barry was an employee.

Source Employment NZ

Important comments from both cases

While the Government has indicated that it intends giving contractors the same benefits, like holidays and sick leave, it is still a way off, and the matter remains a hot topic for employers. Hopefully the following excerpts from the two cases will be useful.

On the essential difference between employees and contractors

- An employee works for the 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.

On industry practice

Contracting arrangements are part of the evolution of work in New Zealand and the way it is structured. While a particular model of working may be commonplace within a particular industry, it does not follow that the commonly adopted model reflects the real nature of the relationship.

"While I accept that industry practice may be relevant to assessing whether a worker is an employee in some cases, I consider that it is a factor best approached with caution. That is because it may lead to the tail wagging the dog. The mere fact that an industry considers that its workers are engaged as independent contractors cannot, of itself, be enough. It may simply reflect a mistaken understanding as to the actual legal status of some or all of its workers. The point is that if Parliament had intended those working within a whole industry to be categorised as independent contractors, it is likely it would have said so rather than imposing a fact-specific, case-by-case test which the Court must work through, applying s 6. In this regard it is notable that Parliament has not chosen to make special provision for courier drivers, unlike sharemilkers and real estate agents (s 6(4)), volunteers (s 6(1)(c)), and certain persons engaged in film production (s 6(1)(d))."

On intention, labelling and inequality of power

The mutual intention of the parties will be relevant, as will the way in which the parties may have labelled their relationship. But neither intention nor labelling are determinative.

The Employment Relations Act was designed to provide a better framework for employment relations, and to recognise that the relationship is not simply a contractual, economic exchange.

It should not be forgotten that one of the key objects of the Act is to acknowledge and address the inherent inequality of power in employment relationships. While true equality of contractual strength may be a feature in a limited number of employment relationships, there are significant dangers in assuming its presence. In this case the facts point away from the conclusion that Mr Barry and CIB entered into the relationship on an equal footing, including because Mr Barry was keen to return to the paid workforce, and had already missed out on one opportunity. While Mr Barry was plainly in a less vulnerable position than many other workers, the reality is that he simply accepted what he was offered. That is not uncommon, for obvious reasons.

On contracting as a trial for employment

"My conclusions as to the real nature of the relationship in this case are underscored by the way in which CIB appears to have dealt with some of its other workers, and the fluidity with which it has been prepared on occasion to move between employee/independent contractor status. I understood (the employer) to say that a decision to switch a worker from independent contractor to employment status had much to do with the extent to which they were regarded as reliable and technically competent".

"The independent contractor model is not an alternative which enables hirers to assess, by other means, suitability for employment. A worker either is, or is not, properly categorised as an independent contractor. Proper categorisation depends on the nature of the relationship and the way in which it operates."

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