



# ➤ An employee, or not an employee ... that is the question

One of the more topical issues in the employment law area concerns the distinction between an employee and an independent contractor.

An employee is entitled to legal rights available under the general law and the Employment Relations Act, which include the right to sue an employer for unjustified dismissal. These advantages are not available to an independent contractor for services, whose rights are limited to those available under his contract and the general contractual law.

There is a temptation for employers to try and retain staff as independent contractors, so as to avoid their obligations not only under the Employment Relations Act but under other basic employment legislation such as the Holidays Act and the Minimum Wage Act, as well.

However, the Employment Relations Authority and Employment Court are wise to these kinds of activities and will hold what is outwardly an independent contract to be a relationship of employer and employee, when circumstances dictate.

This was the case in the 2003 decision of the Employment Court in *Bryson v Three Foot Six Limited*. Bryson is notable in that after the Employment Court had found in favour of the employee, and the Court of Appeal in favour of the employer, the Supreme Court went on to restore the original Employment Court decision. The case represents one of only a few to make it all the way through to the highest Court in the land.

Mr Bryson was seconded from Weta Workshop to Three Foot Six to work as a miniature model maker. After two weeks, he was offered a permanent position as an on-set model technician working on the Lord of the Rings trilogy. The amount of work eventually decreased and Three Foot Six let Bryson go. Bryson claimed redundancy and unjustified dismissal, which he could only sustain if he was an employee and not an independent contractor.

The Employment Relations Authority and Employment Court use statute and judge-made law to determine if a person is, in reality, an independent contractor or an employee. The Employment Relations Act requires a Court to determine “the real nature of the relationship” between the parties. Just labelling someone an ‘independent contractor’ does not necessarily make it so.

The real nature of the relationship is determined by using legal tests called the “control”, “integration” and “fundamental” tests. These relate to matters such as the degree of control exercised over a person’s daily work, the degree to which that work is integrated into a business and outward indicators showing a person is undertaking work on his own account.

The parties’ intentions as to whether one of them is to be hired as an employee or independent contractor are also relevant to the Court’s determination but are not decisive.

Bryson had been retained under written conditions labelled “independent contractor”. However, Three Foot Six exercised considerable control over his work, which was an integral part of its business. Without meaningful evidence that Bryson was in business on his own account, it followed he was Three Foot Six’s employee and not an independent contractor.

What does this all mean for businesses that employ people and for employees themselves?

Business people would want to be wary of retaining staff as independent contractors when, in reality, they are being taken on as employees. Any understanding that employment law may be got round simply by using the term “independent contractor” should be dispelled.

Prospective employees ought to be wary if they are invited to sign a contractor’s agreement, on taking up a role that is closely aligned to and integrated within a particular business.

Those who have already signed contractor’s agreements may also take some encouragement from the knowledge this might not be the “be all and end all” of their relationship with the other party.

## Duncan J Anderson LLB

Although a recent arrival in Taranaki, Duncan already has 18 years’ experience as a general legal practitioner and specialist litigator. Duncan recently returned from four years working as a litigation solicitor in New South Wales and completed the requirements of a Master of Laws degree along with the highly regarded New Zealand Law Society litigation skills programme to complement his move into more specialised areas of legal practice.

Duncan views effective client communication as an essential part of the modern lawyer’s armoury. The more a lawyer can listen to and pick up on a client’s expectations, the more effective s/he will be in representing the company or individual client. That is to a lawyer’s advantage because s/he will have more opportunity to add value to the service provided.

Duncan has been a keen cricketer and is hoping to find a local team this summer. He also intends to continue refereeing rugby union over the winter months.

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