

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 143/08
5115450

BETWEEN NICHOLAS IAIN CAMERON
Applicant

AND PBT COURIERS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Jonathan Smith, Counsel for Applicant
 Candice Murphy, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 15 April and 4 August 2008 from Applicant
 13 May and 4 August 2008 from Respondent

Determination: 25 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Cameron) operated as a courier driver for the respondent (PBT) commencing on 6 August 2001. There was a disagreement between the parties as a consequence of an issue that happened on 21 March 2007 and the upshot was that the relationship between the parties came to an end by PBT giving Mr Cameron 60 days' notice on and from 26 March 2007.

[2] Mr Cameron says that he is an employee of PBT notwithstanding the documentary evidence which suggests otherwise. It follows that Mr Cameron says that he was unjustifiably dismissed from his employment and he seeks remedies.

[3] Mr Cameron was employed, says the relationship was always one of contractor and principal and PBT further contends that the termination of that

relationship was for proper purposes and in accordance with the terms of the contract between the parties.

[4] Because of the confined issues for determination, the parties determined they were happy for the Authority to proceed to investigate the matter on the papers.

Establishing the relationship

[5] The parties executed a memorandum of agreement dated 6 August 2001 which, in clear and unequivocal terms, describes the relationship between the parties as a contract for services.

[6] The evidence before the Authority discloses that Mr Cameron provided at his cost:

- (a) A vehicle and a replacement vehicle should that be necessary;
- (b) A radio telephone;
- (c) A vehicle security system.

[7] In addition, Mr Cameron had to pay:

- (i) The operating costs of all his equipment;
- (ii) The maintenance of all his equipment;
- (iii) Licences, certificates, registration and the like;
- (iv) Taxation GST and ACC levies;
- (v) His own insurance;
- (vi) The cost of his uniform;
- (vii) His own goods services licence.

[8] Mr Cameron says that the agreement and the structure of the relationship are, in effect, a *sham* because:

- (a) The hours that he worked were strictly prescribed by PBT;
- (b) He was required to report to PBT at particular times four times a day;

- (c) PBT effectively prepared the invoices against which Mr Cameron was paid;
- (d) Mr Cameron could not, in truth, perform services for anyone else by virtue of the number of hours he had to work for PBT;
- (e) Mr Cameron operated for PBT in a confined geographical area which PBT could change at will;
- (f) PBT imposed a very strict restraint of trade on Mr Cameron.

[9] I am satisfied on the evidence available to me that the description provided of the relationship between Mr Cameron and PBT is consistent with courier industry practice. For example, it is clear from the evidence that PBT operates a *hub and spoke* system, the effect of which is that each courier operating in his or her own area returns to the depot four times a day with the parcels that he or she has collected from his or her area and then passes those parcels to other couriers who would deliver them to their particular area.

[10] Further, PBT operates an invoicing system known as a BCI (for buyer credited invoicing) system. The invoices are generated by PBT using as raw data the tickets which each parcel has. Each ticket contains identifying information which enables PBT and the courier to identify the run number and all the other relevant details. I accept that, on an average month, there might be upwards of a thousand of these individual transactions, each of which represents an item of revenue for the courier and an item of cost for PBT, using those expressions in an entirely neutral way without necessarily committing to a principal contractor relationship.

[11] PBT says that the effect of this payment and cost regime was to provide an adequate accounting process which kept track of the individual items which generated revenue, but that the work flow was generated not by PBT itself but by PBT's clients.

[12] It is already clear that the relationship between these parties is described as a relationship between a principal and a contractor and all the usual incidences of self-employment appear to be present in analysing Mr Cameron's particular circumstances. He says, however, that the apparent contract for services is no more and no less than *a sham*. In order to assess that claim, the Authority needs to consider the statutory definition of employment, the leading cases and the various tests used by

the Courts for determining whether, in truth, a relationship is in fact one of employment notwithstanding the appearance that the relationship is one between a contractor and his principal.

The relevant law

[13] Section 6 of the Employment Relations Act 2000 requires the Authority to determine the *real nature* of the relationship between the parties and to consider all relevant matters, including the parties' intentions and in particular, the Authority is not to treat as decisive any statement made by a party. It follows that just because the relationship looks like a relationship between a contractor and his principal and it is documented as such, does not mean that the relationship in truth is of such a character.

[14] The present case is similar to the factual matrix in the Court of Appeal decision *TNT Worldwide Express (NZ) Ltd v. Cunningham* [1993] 3 NZLR 681. That much is common ground between the parties. The essence of the difference between the parties is that while PBT seeks to encourage me to apply *Cunningham's* case to the present situation, Mr Cameron seeks to encourage me to rely on the more recent decision of *Bryson v. Three Foot Six Ltd* (2005) 2 NZELR 135 and to accept the characterisation that *Cunningham* is no longer good law because of the statutory enactment to which I have just alluded. The contention advanced on behalf of Mr Cameron is that s.6 of the Act is designed to *nudge the law away* (to use the phrase from Mazengarb's Employment Law para.6.4) from *Cunningham*.

[15] Counsel for PBT, in her concluding submissions, argues that *Cunningham's* case remains good law and that it should be applied in this case. She refers to a number of the particular observations of individual Judges and to more recent authority (including *Bryson*) as evidence for the view that the narrow interpretation of *Cunningham* may have been unfair, or to use Chief Judge Colgan's expression, in *Curlew v. Harvey Norman Stores (New Zealand) Pty Ltd* [2002] 1 ERNZ 114 that *Cunningham* may have had a *bad press*.

[16] I am satisfied that the argument between the parties about whether *Cunningham* is still good law is in a sense a red herring. *Bryson*, a more recent decision of the Supreme Court, clearly sets out the principles that are to apply in making the judgments required in the present matter and I intend to apply those principles to derive the determination required of the Authority in the present case.

[17] In *Bryson*, the Supreme Court restored the earlier decision of Her Honour Judge Shaw in which she summarised the appropriate principles as follows:

- (a) There must be a determination about the real nature of the relationship;
- (b) The intention of the parties is relevant but not decisive;
- (c) Statements by the parties are not decisive;
- (d) The real nature of the relationship can be ascertained by analysing the common law tests;
- (e) The industry practice may assist although again this is not determinative.

What was the intention of the parties?

[18] The Court in *Bryson* held that the intention of the parties was still relevant but was not decisive. It follows that the fact there is a memorandum of agreement between the parties which plainly proceeds on the basis of a contract of service is a relevant consideration but not a decisive one. Similarly, the various factual indicators pointing to a contractual relationship are again relevant but not decisive.

[19] In my considered opinion, the intention of the parties, as it may be discerned from their behaviour at the time the contract was formed, suggests an intention to found a contractual rather than an employment relationship. I refer now to the reasons for reaching that conclusion.

[20] First, the memorandum of agreement between the parties is completely unequivocal. There can be no doubt at least of the intention of the drafter in the nature of the proposed relationship. Mr Cameron signed the agreement. He did that before commencing his association with PBT. PBT alleges that Mr Cameron had the opportunity to obtain legal advice and there was also a suggestion that Mr Cameron's mother be involved in the arrangements so as to help explain the relationship. However, Mr Cameron denies that his mother was ever involved and denies that it was ever proposed to him that he should take legal advice.

[21] Fundamental to Mr Cameron's evidence on this point is his contention that by reason of his age when the document was executed (he was 20), he was effectively

unused to business matters and had little real idea what he was signing. His evidence is that he was not told that he was to be a contractor, although that evidence is disputed by PBT. I think it more likely that Mr Cameron was told the nature of the agreement. Certainly Mr Cameron confirms that even if he had been told that he was to be a contractor rather than an employee, he would not have understood the difference.

[22] At the point at which the relationship was entered into, it is clear that PBT envisaged a contractual relationship but equally apparent that Mr Cameron was not clear about the difference between a contractual relationship and an employment relationship, and whatever he may or may not have been told, he is adamant that he sought no legal advice.

[23] However, that does not seem to me to be the end of the matter. Within a very short space of time after the execution of the agreement and Mr Cameron commencing his duties, he would, of necessity, have had to attend to the normal incidents of self-employment, including the purchase or lease of plant and equipment, the arranging of the various permissions or licences and, critically, the various accounting and tax consequences of being a self-employed person. It seems to me that even if Mr Cameron was uncertain about his legal status when he signed the agreement, within a very short space of time he could have been under no illusion that he was anything other than a young self-employed person. In order to run his business and make a living, Mr Cameron would have, of necessity, had to make decisions about how to achieve the best return for his effort and it is clear from the documents filed in the Authority that he engaged professional advice to, at the very least, file his taxation returns.

[24] There is evidence from Mr Cameron that, with the assistance of a friend, he was to establish a limited liability company in order to run his business through, but that cannot be the position because the taxation summaries that have been provided as evidence are in Mr Cameron's own name and not in the name of the purported company. That financial information disclosed to the Authority quite clearly includes the revenue generated by Mr Cameron's activities at PBT.

[25] I also consider the length of time that Mr Cameron worked in this relationship he says he does not understand is a relevant factor in determining the intention of the parties. Even if it were true at the very beginning that Mr Cameron was uncertain

about his status (and I accept that that is more rather than less likely), I hold that, within a short period of time, Mr Cameron must have been under no illusion about the relationship that he was in because of the things that he would have had to do in order to turn himself into a small business person. Furthermore, the fact that the relationship inured for five or six years on precisely the basis it started (in the contractual sense) suggests to me that, if the intention was unclear at the beginning, it became clearer as time went on and must have solidified into an understanding by Mr Cameron at a stage earlier than the point at which he brought his proceedings in the Authority, alleging that he was in fact an employee.

[26] I am particularly drawn to this conclusion by Mr Cameron's evidence about the creation of his company. As I have made clear, there is no question of the company being the contracting party because the tax information made available to the Authority confirms that Mr Cameron himself was a taxpayer, but the very fact that Mr Cameron gave evidence of being assisted by a friend to create the company strongly suggests, in my mind, an intention to create or participate in a business arrangement rather than an employment relationship. However young and naïve Mr Cameron was, he clearly knew enough to get advice from friends about what he needed to do in order to ensure all his arrangements were in place.

The common law tests applied?

[27] The Supreme Court made it clear in *Bryson* that the common law tests were not to be exclusively applied but were effectively to be used as an aid to determining the real nature of the relationship.

The economic reality test

[28] The economic reality test in its classic formulation asks the question whether the person performing the services is performing them as a person in business on his or her own account. If the answer is yes, then the relationship is a contract for services. If the answer is no, then the relationship is one of employment: *Cooke J Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173.

[29] The question then is whether Mr Cameron was indeed a person performing business services on his own account or not. Mr Cameron set up his own accounting structure on a business basis. He owned his own vehicle when he first spoke with

PBT about the opportunity. He acquired all of the other items of plant or equipment which were required to enable him to fulfil his obligations.

[30] However, Mr Cameron wore a uniform which was in PBT colours. His van was signwritten in PBT colours. The question of whether Mr Cameron could accept other commissions from other potential clients is disputed by the parties' evidence. PBT's evidence is that Mr Cameron could do precisely that; Mr Cameron says that his time was fully committed to PBT and so there was no opportunity for him to diversify.

[31] PBT emphasised that Mr Cameron could have, and indeed may have, identified new clients which would benefit both of them. Certainly PBT says that some other courier operators (Mr Cameron's contemporaries) do precisely that.

[32] PBT acknowledged that Mr Cameron had to wear a PBT uniform. It says this is because Mr Cameron was representing it in the marketplace, but that did not mean that he is not in business on his own account. PBT says there is nothing to preclude Mr Cameron from taking other work and that many couriers working with PBT do precisely that. Mr Cameron says on the one hand that there is insufficient time to do that, and on the other hand elsewhere in his evidence also argues that he had insufficient flexibility to change his hours, even when there was no work to do. Clearly both statements cannot be right and I prefer the evidence of PBT that there was an ability for Mr Cameron to perform other duties for other clients; I accept PBT's evidence that other couriers did precisely that.

[33] Further, the memorandum of agreement between the parties very clearly sets out the right of Mr Cameron to perform courier services for others, either outside the hours specified for PBT work or as agreed by PBT. As I have already mentioned, I accept PBT's evidence that other couriers have obtained its consent in terms of that clause.

[34] Furthermore, the evidence is palpable that Mr Cameron's income was determined by his effort and his organisation and not simply by the hours that he worked. That conclusion is amply demonstrated by the financial material provided to the Authority by Mr Cameron which shows the normal business fluctuations that one would expect. I accept PBT's evidence that organisation and effort by couriers produced results for them and for PBT.

[35] However, Mr Cameron urges me to take account of the fact that he was guaranteed a minimum weekly payment which he says was analogous to a wage. In effect, I am urged to note that the effect of this arrangement must have been to remove, to use the old formulation, *the chance of a profit or the risk of a loss*. I do not accept that that conclusion follows. First, as I have just made clear, it is contradicted by Mr Cameron's own financial records which show the usual business fluctuation that you would expect in a business of this kind. He paid tax on differing amounts each year so the minimum weekly payment was no more than a progress payment. Second, the very fact that Mr Cameron was able to negotiate such an arrangement seems to me to, of itself, confirm that he was in business on his own account. Again, relevant evidence from PBT discloses that a number of couriers reached this sort of arrangement, always by negotiation.

[36] Finally, I note that the arrangements between the parties also required that Mr Cameron provide both a relief driver and a relief vehicle should either be necessary. While those arrangements are absolutely standard in the courier industry, they do nonetheless tend to confirm two aspects of normal business risk which rest squarely with Mr Cameron.

The control test and the integration test

[37] The oldest of the common law tests, the control test, seeks to identify whether the party allegedly the employer, controls the supposed employee, not only in terms of what they do but also how and when they do it. On the basis of this test alone, it is difficult to not see the balance tip in favour of Mr Cameron as an employee. Clearly, PBT requires Mr Cameron to perform certain tasks, but more importantly, it requires him to perform those tasks in a particular way and on a particular cycle. For instance, PBT requires Mr Cameron to wear a uniform and to drive a van which is signwritten with its logo. Mr Cameron is required to maintain contact with PBT through radio telephone and other electronic means. Mr Cameron is required to attend the depot four times a day in order to exchange parcels with other couriers.

[38] The final test typically referred to at common law is the so-called integration test. Lord Denning spoke of a man in employment being a part of the business and his work being *an integral part of the business*. Again, looking exclusively at this test, it is difficult not to sense the balance tipping again in favour of Mr Cameron's argument that he was in fact an employee. Plainly, Mr Cameron's activities were

intimately incorporated into the activities of PBT and Mr Cameron was an integral part of PBT's Christchurch business. Indeed, were Mr Cameron not there, PBT's overall business would suffer.

[39] However, those matters of themselves do not in my view tell the whole story. There may well be a high element of control and integration. But Mr Cameron can do other work, and he has created his own business which has fluctuating income, as most businesses have. Furthermore, Mr Cameron has the benefits of self employment for tax purposes throughout the whole relationship with PBT and to get this, he sets off his business expenses against his business income.

[40] Mr Cameron worked a confined area which he says PBT effectively determined but that is no different from the franchisor/franchisee model. Furthermore, Mr Cameron could have assertively *mined* his area to generate new business for both parties; some couriers did precisely that and PBT encouraged that.

[41] Mr Cameron had his invoices prepared in draft by PBT which suggests both control and integration. But that was for practical reasons; PBT had the base unit date on which both he and they got paid. PBT had the larger infrastructure to manage that administrative function.

Determination

[42] I reach the conclusion on the balance of probabilities that Mr Cameron is in truth a contractor and not an employee and it follows that his claim to have been unjustifiably dismissed from his employment must fail.

[43] In assessing the aggregate of the analysis that I have undertaken, I find that I have been most persuaded by consideration of the economic reality test as indicative of the *real nature of the relationship*. I am strengthened in my conclusion by a number of decisions where the Court has, for instance, accepted a high degree of integration (or control) but yet concluded that the economic reality test outweighed those other analyses so as to reach the view that a contractual relationship was indicated.

[44] That being my conclusion, I am unable to take Mr Cameron's matter further.

Costs

[45] Costs are reserved.

James Crichton
Member of the Employment Relations Authority