IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA2/2018
[2018] NZCA 256

BETWEEN	LSG SKY CHEFS NEW ZEALAND LIMITED Applicant
AND	KAMLESH PRASAD First Respondent
	LIUTOFAGA TULAI Second Respondent
	SOLUTIONS PERSONNEL LIMITED AND BLUE COLLAR LIMITED Third Respondents

Hearing:	11 June 2018
Court:	French, Cooper and Brown JJ
Counsel:	P G Skelton QC for Applicant P Cranney for First and Second Respondents P F Wicks QC for Third Respondents
Judgment:	16 July 2018 at 11.30 am

JUDGMENT OF THE COURT

A **The application for an extension of time to apply for leave to appeal is granted.**

B **The application for leave to appeal is declined.**

C **The applicant is ordered to pay one set of costs to the respondents for a standard application with usual disbursements.**

REASONS OF THE COURT

(Given by French J)

Introduction

[1] LSG Sky Chefs New Zealand Ltd (LSG Sky Chefs) seeks leave under s 214(2) of the Employment Relations Act 2000 (the Act) to appeal a decision of the Employment Court. The decision concerned a labour hire arrangement. The Employment Court ruled that for the purposes of the definition of "employee" under the Act,[1] there was a contract of service between LSG Sky Chefs and the first and second respondents.[2]

[2] Section 214(2) of the Act provides that an application for leave to appeal must be filed within 28 days of the decision sought to be appealed. LSG Sky Chefs filed its appeal 37 days after the Employment Court had delivered its decision. It was therefore out of time.[3] The section does however also empower this Court to grant an extension of time. We readily do so in this case. The delay was short and was due to an understandable error regarding the computation of the 28 days over the Christmas vacation.

[3] The application for an extension of time is accordingly granted and we now turn to address the merits of the application for leave to appeal.

Background

[4] The third respondents Solutions Personnel Ltd and Blue Collar Ltd (Solutions) are labour hire companies. LSG Sky Chefs contracted with them for the provision of large numbers of workers, including the two respondents Mr Prasad and Ms Tulai, to work in its in-flight catering business.

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1 Employment Relations Act 2000, s 6.

2 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 [EmpC judgment].

3 The applicant sought to argue otherwise by reference to the Employment Court regulations but those regulations cannot govern procedure in this Court. See Employment Court Regulations 2000, regs 74A and 74B.

[5] When Mr Prasad and Ms Tulai signed up with Solutions they each signed a document which purported to be an independent contractor agreement between them and Solutions. They were paid by Solutions for the work they did for LSG Sky Chefs. Solutions was in turn paid by LSG Sky Chefs for the hours Mr Prasad and Ms Tulai worked. Both were engaged full time working for LSG Sky Chefs, one of them for four years, the other for two years. There were no written agreements between them and LSG Sky Chefs.

[6] In the proceedings before the Employment Court, the key issue was whether Ms Tulai and Mr Prasad were as they contended the employees of LSG Sky Chefs. For its part, LSG Sky Chefs argued the two were independent contractors, and if not independent contractors, they were Solutions' employees.

[7] In support of its arguments, LSG Sky Chefs relied on an earlier decision of the Employment Court in *McDonald v Ontrack Infrastructure Ltd* (*Ontrack*) and in particular on statements made in that case to the effect that before a contract of service can be held to exist, the common law requirements of offer, acceptance, contractual intention, consideration and certainty must all be satisfied.[4]

The decision of the Employment Court

[8] The Employment Court described the arrangement at issue as a triangular, labour hire relationship involving as it did an end user and an intermediary.[5]

[9] The Court went on to say that although the work arrangement differed from the traditional bilateral employer–employee model, the definition of "employee" contained in s 6 of the Act still applied and drove the analysis rather than the common law relating to contract formation.[6] The Court considered that if *Ontrack* could be interpreted as suggesting otherwise (which the Court did not accept) then the Court respectfully disagreed with it.[7]

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4 *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223 at [36] [*Ontrack*].
5 EmpC judgment, above n 2, at [31].
6 At [18]–[20] and [31].
7 At [22] and [31].

[10] Section 6 provides:

> **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
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> …
>
> (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.
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> (3) For the purposes of subsection (2), the court or the Authority–
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> (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.
>
> …

[11] In the view of the Court, s 6, as interpreted by the Supreme Court in *Bryson v Three-Foot Six Ltd,*[8] required it to assess whether Mr Prasad and Ms Tulai were in contracts of service with LSG Sky Chefs having regard to all relevant matters.[9] Relevant matters included the written and oral terms of any agreement, the way the relationship operated in practice and any features of control and integration. It was the real nature of the relationship that was determinative.[10]

[12] The Court noted the absence of documentation between LSG Sky Chefs and the two workers. This it said pointed away from a contract of service as did the nature and existence of documentation existing between LSG Sky Chefs and Solutions. However, the Court considered that the written material was out of step with the real nature of the relationship as it operated in practice and therefore did not assist in assessing how to characterise the relationship.[11]

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8 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [32].
9 EmpC judgment, above n 2, at [36]–[38].
10 At [41].
11 At [60].

[13] The Court then traversed the evidence regarding how the relationship operated in practice including evidence as to application forms, job interviews, induction processes, the wearing of LSG Sky Chefs uniforms, time sheet recording, patterns of work, communications regarding additional hours and promulgation of rosters. It concluded the evidence showed that two factors operated in tandem. First, LSG Sky Chefs provided Mr Prasad and Ms Tulai with a regular stream of work which the two workers expected and which LSG Sky Chefs expected them to be available to perform. Secondly, there was continuity of relationship over an extended period of time. Both factors individually and in combination, the Court said, pointed towards a contract of service.[12]

[14] Turning to control and integration, the Court found on the evidence that LSG Sky Chefs exercised significant direction and control over Mr Prasad's and Ms Tulai's day to day work. That coupled with the extent to which they were integrated into LSG Sky Chefs' business pointed firmly, the Court said, towards an employment relationship.[13]

[15] Finally, the Court applied the fundamental test, finding it was fanciful to suggest that either Mr Prasad or Ms Tulai was in business on their own account. They did not issue invoices or hold business records, and the expectation was that they personally would undertake the work.[14] The Court also found that neither of them had any understanding of the purported contract documents Solutions had asked them to sign.[15]

[16] The Court concluded that each of the respondents worked for LSG Sky Chefs under a contract of service and made declarations accordingly.[16]

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12 At [77].
13 At [78]–[80].
14 At [85]–[89].
15 At [50]–[51].
16 At [100].

The application for leave

[17] LSG Sky Chefs seeks leave to appeal on three questions of law:

(a) Did the Employment Court err in finding that the applicant employed each of the first and second respondents under a contract of service by misdirecting itself as to the correct interpretation and application of s 6 of the Act?

(b) Did the Employment Court err in its interpretation and application of s 6 by failing to apply the approach identified in *Ontrack* which involves determining:[17]

(i) whether there is any contract express or implied between the parties; and

(ii) if so whether the contract is a contract of service?

(c) Did the Employment Court misapply the s 6(2) inquiry (as to the real nature of the relationship) by not applying common law principles of contract formation to determine whether there was a contractual relationship between the applicant and each of the first and second respondents?

[18] On behalf of LSG Sky Chefs, Mr Skelton QC submitted that the reasoning of the Employment Court represented a significant departure from established legal principles.

[19] The orthodox (and in his view correct) approach required a two stage analysis. The Court must first ask itself whether there was an intention to create contractual relations. And then only if satisfied of the existence of a contractual relationship should it consider what type of contract it was — contract of service or contract for services — by applying the established tests such as the integration and control test.

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17 *Ontrack*, above n 4.

Where the Employment Court had gone wrong was to reason backwards. It had gone straight to stage two without considering whether a contract had come into existence in the first place and if so when.

[20] Mr Skelton argued that the implications of the decision for the labour hire industry as a whole were significant and required appellate guidance.

Analysis

[21] Under s 214(3) of the Act, this Court may only grant leave to appeal if the question of law raised by the proposed appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.

[22] In our view, the proposed appeal does not satisfy those criteria. We say that for the following reasons.

[23] We are not persuaded that the Employment Court has purported to lay down any far reaching new principles or that its reasoning is capable of being described as aberrant. As Mr Skelton acknowledged, it is well established that the existence of a contract may be inferred by conduct. In such cases, the Court will look at the totality of the dealings and determine whether those dealings should be regarded as having resulted in a contract coming into existence.[18]

[24] In our assessment that is all the Employment Court has done in this case as indeed it was enjoined to do by s 6. Significantly, after an extensive review of the evidence, the Employment Court expressed its conclusion in terms that reflect entirely orthodox reasoning:[19]

> [97] We are satisfied that the evidence discloses the requisite mutuality of obligations between LSG and each of the plaintiffs. LSG plainly expected that the plaintiffs would turn up to work each day it rostered them on, unless a prior arrangement had been made with it; the plaintiffs plainly expected that when they did show up to work they would be given work by LSG; both

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18 Jeremy Finn "The phenomena of agreement" in Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 37 at 42.

19 EmpC judgment, above n 2.

> parties understood that the plaintiffs would personally do the work; and each of the plaintiffs received payment for the work they did for LSG from LSG, albeit via Solutions. While Mr Prasad later signed a self-styled employment agreement with Blue Collar we are satisfied that nothing substantively changed in reality.
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> [98] A labour-hire agreement does not represent an impenetrable shield to a claim that the "host" is engaging the worker under a contract of service. Much will depend on the particular facts of the individual case and an analysis of the real nature of the relationship, including how it operated in practice.

[25] As the Court recognised, the inquiry mandated by s 6 is an intensely factual one. Each case must turn on its own facts. As indeed did this one. We agree with the respondents that on the facts before the Employment Court it would have been surprising had the Court reached any other conclusion than the one it did.

Outcome

[26] The application for an extension of time to apply for leave to appeal is granted.

[27] The application for leave to appeal is declined.

[28] As regards costs, Mr Skelton accepted that if the application were declined, then the respondents were entitled to costs. We agree and therefore order the applicant to pay one set of costs to the respondents for a standard application and usual disbursements.

Solicitors:
Douglas Erickson, Auckland for Applicant
Oakley Moran, Wellington for First and Second Respondents
Russell McVeagh, Auckland for Third Respondents